APPENDIX A

MARICOPA-STANFIELD IRRIGATION AND DRAINAGE DISTRICT, a Municipal Corporation of the State of Arizona; CENTRAL ARIZONA IRRIGATION AND DRAINAGE DISTRICT, a Municipal Corporation of the State of Arizona; and NEW MAGMA IRRIGATION & DRAINAGE DISTRICT, a Municipal Corporation of the State of Arizona, Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, Defendant-Appellant.
No. 97-16432.

United States Court of Appeals For the Ninth Circuit.

Argued and Submitted May 12, 1998.
Decided July 7, 1998.
Opinion Withdrawn Oct. 14, 1998.
Decided Oct. 14, 1998.

Appeal from the United States District Court for the District of Arizona; Stephen M. McNamee, District Judge, Presiding.
D.C. No. CV-94-02188-SMM.

Before GOODWIN, PREGERSON, and FERGUSON, Circuit Judges.

OPINION

PREGERSON, Circuit Judge:

BACKGROUND

The Colorado River and its tributaries are the major sources of water in the arid Southwest. Careful in the years of drought, the United States has established reclamation projects to channel water where it is needed most and to head off disputes among water users. But in its efforts to settle some water rights

disputes, sometimes the government creates others. This case involves one such dispute. A working familiarity with the history of water rights legislation in the Southwest is essential to a full comprehension of this controversy.

Shortly after the first World War, legislators considered ways to regulate and capture for beneficial use Colorado River flood flows that annually were lost. A dam in Arizona with a canal to California was contemplated. Plans like this one worried inhabitants of the Upper Basin states (Colorado, Utah, New Mexico, and Wyoming), who knew that water rights might be lost forever to the states in the Lower Basin (Arizona, Nevada, and California) under the doctrine of prior appropriation. To forestall water rights disputes, Congress ratified the Colorado River Compact in 1922. *See* Act of August 19, 1921, art. 2, 43 Stat. 171, *reprinted in* Ariz.Rev.Stat. § 45-1311. Among other things, the Compact apportioned 7.5 million acre feet ("AF") of water annually to the states in the Lower Basin.[1]

But the Compact did not apportion water among the states. The Boulder Canyon Project Act of 1928 parceled water among the Lower Basin states, allotting Arizona 2.8 million AF annually.[2] *See* 43 U.S.C. § 617 (1998). This Act also gave the Secretary of the Interior broad administrative authority over the water, including the power to apportion water within the states. *See id.* The Supreme Court confirmed the Lower Basin apportionment in 1963 and recognized the breadth of the Secretary's discretion to allocate Colorado River water.

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[1]The Compact guaranteed an equal amount of water to the Upper Basin states. The Upper Basin water supply is not at issue in this lawsuit.

[2]California received 4.4 million AF annually, and Nevada annually was entitled to 300,000 AF. Neither of these water apportionments is at issue in this suit.

Arizona v. California, 373 U.S. 546, 579-80, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963).

The Colorado Basin Project Act was enacted in 1968 to apportion water among the regions of Arizona. *See* 43 U.S.C. §§ 1501-1556 (1998). This Act authorized the Secretary of the Interior to build, operate, and maintain the Central Arizona Project (the "CAP"), which allocates Arizona's share of Colorado River water after other users with perfected rights take their water. *See id.* at § 1521. The Act also permitted the Secretary to contract for the repayment of CAP construction costs with a single political subdivision in Arizona. *See id.* at § 1524. In 1971, Arizona created this subdivision: the Central Arizona Water Conservation District (the "CAWCD"). *See* Ariz.Rev.Stat. § 48-3701 *et seq.* (1985). In addition to its duty to contract with the Secretary to finance the CAP, the CAWCD was responsible for subcontracting with users to deliver CAP water and to levy a property tax that partly would offset the CAP's construction and operating costs.

The Secretary was left to devise and implement a system for determining how and to whom CAP water would be sold. The Secretary settled upon an allocation-contract mechanism for distributing CAP water. First, in 1983, the Secretary apportioned the right to purchase CAP water by way of general allocations to three priority pools, in descending order of priority: Indian tribes, municipal and industrial users, and non-Indian agricultural users. *See* CAP Water Allocations, Fed.Reg. 12446-49 (1993) (the "1983 notice").[3] Within those pools, the

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[3]In the years preceding the final allocations published in the 1983 notice, the Secretary considered and rejected all six allocation methods proposed by various public and private entities. Instead, the Secretary adopted a system that represented an amalgam of two of the proposals he had heard. *See* CAP Water Allocations, 48 Fed.Reg. 12446, 12446 (1983). The Secretary decided that the Indian tribes, which include the Ak-Chin and the San Carlos

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Secretary allotted CAP water to specific users.[4] Second, after the CAP water was allocated, the allottees could purchase CAP water by way of subcontracts with the United States and the CAWCD. These contracts--and not the allocations themselves--determined how much water CAP allottees actually were entitled to receive.[5]

FACTS AND PRIOR PROCEEDINGS

The plaintiffs are irrigation districts (the "Districts") who were allotted percentages of the non-Indian agricultural pool in the 1983 notice. Each of the Districts entered into a subcontract with the United States Department of the Interior and the CAWCD in November 1983. Pursuant to their contracts, the Districts collectively were scheduled to receive forty-three percent of the CAP non-Indian agricultural water supply. As consideration for these subcontracts, the Districts promised to

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[3](...continued)
Apache Tribes, could contract for up to 309,000 AF of water from the CAP. *See* CAP Water Allocations, 48 Fed.Reg. at 12447. Municipal and industrial users were entitled to contract for as much as 640,000 AF of CAP water. See CAP Water Allocations, 48 Fed.Reg. at 12447-49. The non-Indian agricultural pool was allotted the right to contract for whatever CAP supply remains after the tribal, municipal, and industrial users purchased the water allotted to them in 1983. See CAP Water Allocations, 48 Fed.Reg. at 12449.

[4]Users in the Indian and municipal and industrial pools each were allocated specific acre-footage amounts of CAP water. The users in the lowest-priority non-Indian agricultural pool each were allotted a percentage of the remaining 1983 CAP supply, as projected in the 1983 notice.

[5]Under the CAP hydraulics, the allocations listed in the 1983 notice determined how much CAP water that the various pools and users could purchase. Water "availability," which was impacted by the demands of higher-priority users and drought conditions, determined the quantity of water that CAP users *actually* could buy. *See* CAP Water Allocations, 48 Fed.Reg. 12446-49 (1983). Within these parameters, how much water CAP users received was limited only by their demand. Thus, users who wanted to receive the CAP water allotted to them were required to contract for it.

repay the costs involved in constructing the facilities needed to deliver their CAP water and paid twenty percent in advance.

In 1984, after the Secretary of the Interior announced his allotments and after the Districts contracted for their allotted shares of the residual CAP water, Congress entered into a water-rights settlement with the Ak-Chin Tribe. *See* Act of Oct. 19, 1984, Pub.L. 98-530, § 2(k), 98 Stat. 2698, 2701 (1984) (the "Ak-Chin Settlement Act"). Therein, Congress directed the Secretary of the Interior annually to deliver a permanent supply of 75,000 AF of CAP water to the Ak-Chin Indian Community,[6] or 85,000 AF of water when sufficient water was available. Congress specified the sources and priorities of the water that the Ak-Chin would receive. First, Congress directed the Secretary to allocate to the Ak-Chin Tribe some 50,000 AF of Colorado River water which the Yuma-Mesa Division had abandoned, and which the Secretary had not included in the CAP when he made his 1983 allocations.[7] Second, Congress

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[6]The Ak-Chin Community is an Executive Order reservation located approximately 30 miles south of Phoenix, Arizona.

[7]In the proceedings leading up to the Ak-Chin Settlement Act, Congress heard the Districts complain that the Yuma-Mesa Division water was already part of the CAP and thus, unavailable for allocation to the Ak-Chin Tribe. Ultimately Congress rejected the Districts' complaint, allocating the unused Yuma-Mesa Division water to the Ak-Chin Tribe and allocating the excess Ak-Chin water to the CAP. *See* Act of Oct. 19, 1984, Pub.L. 98-530, §§ 2(f)(1), 2(k), 98 Stat. 2698, 2699, 2701 (1984).

In an effort to show that they relinquished something of value in exchange for Congress's allocation of the excess Ak-Chin water to the CAP, the Districts renew their argument that the Yuma-Mesa Division water already was allocated to the CAP when Congress diverted that allotment to the Ak- Chin Tribe in 1984. There simply is no evidence that the Secretary ever allocated this water to the CAP. *See* Letter from James Watt, Secretary of the United States Department of the Interior, to Congressman Morris D. Udell 6 (Oct. 7, 1983) (stating that the Yuma-Mesa Division water "has not

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specified that the Ak-Chin Tribe would keep the 58,300 AF of CAP water allotted to it in the 1983 notice. But because these two sources together produced 23,300 to 33,300 AF more water than the Ak-Chin Tribe was entitled to under the terms of the settlement, Congress stated that the Secretary "shall allocate" this excess Ak-Chin water "on an interim basis to the Central Arizona Project." Act of Oct. 19, 1984, Pub.L. 98-530, § 2(k), 98 Stat. 2698, 2701 (1984).

The excess Ak-Chin water allocation remained in the CAP for eight years. In the San Carlos Apache Tribe Water Rights Settlement Act of 1992, Congress provided that the excess Ak-Chin CAP water would be reallocated to the San Carlos Apache Tribe. *See* San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub.L. No. 102-575, tit. XXXVII, §§ 3701-3711, 106 Stat. 4740 (the "SCAT Act"). The Districts urged Congress to return the excess Ak-Chin water to the "Central Arizona Project," as the Ak-Chin Settlement Act directed. Congress rejected that plea, but included in the SCAT Act a waiver of sovereign immunity for suits based on a CAP contractor's claim that the SCAT Act unlawfully deprived him of legal rights to the excess Ak-Chin water allocation.

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[7](...continued)
been included in calculations of the water committed to the CAP").

What Arizona representatives may have hoped is irrelevant to whether the water actually was allocated to the CAP. Likewise, whether officials from the Bureau of Reclamation and the Arizona Water Commission may have projected that the Yuma-Mesa Division water would be included in the CAP is immaterial. The Secretary is not obliged to accept those projections. *See* Central Arizona Project, 45 Fed.Reg. 81265, 81271 (1980) (rejecting the projections of CAP water availability made by two state agencies). For these reasons, we recognize that the Districts have not created a genuine issue of material fact that the Yuma-Mesa Division water was included in the allocations published in the 1983 notice.

On October 28, 1994, the Districts sued the United States in district court.[8] In their suit, the Districts contended that the SCAT Act had taken their rights to the excess Ak-Chin water allocation without just compensation. On December 15, 1995, the parties filed cross-motions for summary judgment on the issue of liability only. The court granted the Districts' motion on February 21, 1997.

The government timely appeals.[9] The Districts request attorneys' fees on appeal pursuant to 28 U.S.C. § 2412(d)(1). As we explain below, we reverse the district court's grant of summary judgment to the Districts, and we deny their request for fees.

ANALYSIS

I.

[1-3] We have jurisdiction of this interlocutory appeal pursuant to 28 U.S.C. § 1292(b). We review the district court's grant of summary judgment de novo. *See Covey v. Hollydale Mobilehome Estates,* 116 F.3d 830, 834 (9th Cir.1997). Jurisdictional issues, including questions of standing, also are reviewed de novo. *See San Diego Co. Gun Rights Comm. v. Reno,* 98 F.3d 1121, 1124 (9th Cir.1996). The construction of

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[8]Neither the Ak-Chin nor the San Carlos Apache Tribe is involved in this controversy. Because the Districts are seeking damages rather than injunctive relief, the outcome of this case will have no effect on the rights secured to those tribes in their respective settlements with the United States.

[9]The Salt River Project Agricultural Improvement and Power District (a political subdivision of Arizona) and the Salt River Valley Water User's Association (an Arizona corporation) were parties to the SCAT Act. *See* San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub.L. No. 102-575, tit. XXXVII, § 3705(a), (c), 106 Stat. 4740, 4744-45 (1992). Both filed an amicus brief in support of the government, arguing that the Districts lacked standing to sue under SCAT Act and that the district court therefore lacked jurisdiction.

a statute is reviewed de novo. *See United States v. Hockings,* 129 F.3d 1069, 1070 (9th Cir.1997).

II.

[4] For the first time on appeal, the amici argue that the Districts lack standing to sue under the SCAT Act. Generally, issues not raised in the district court cannot be asserted on appeal. *Westlands Water Dist. v. Firebaugh Canal,* 10 F.3d 667, 673 (9th Cir.1993). But because "Article III standing is a jurisdictional prerequisite," *Hickman v. Block,* 81 F.3d 98, 101 (9th Cir.1996) (citation omitted), we must consider standing whether or not the issue was raised in the district court. *See Firebaugh Canal,* 10 F.3d at 673.

[5] The Districts bear the burden of demonstrating that they had standing to bring their action. See *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559- 61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). To establish standing, the Districts must show three things:

> First, [the Districts] must have suffered injury to a legally protected interest. This injury must be both concrete and particularized, and actual or imminent rather than conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. Third, the injury must be redressable by a favorable judicial decision.

Hickman, 81 F.3d at 101 (quoting *Lujan*, 504 U.S. at 559-61, 112 S.Ct. 2130) (citations and internal quotation marks omitted). Amici insist that we lack jurisdiction of this controversy because the Districts have not alleged a particularized injury to a legally protected interest. Amici advance three arguments in support of this position.

[6] First, amici point out that only CAP contractors have standing to sue under the SCAT Act. The pertinent provision states:

> (f) CLAIMS. --(1) The United States District Court for the District of Arizona and the United States Claims Court are authorized to hear and decide any claim brought by the [CAWCD] *or other contractors of CAP water.* Any such claim shall be filed within two years of the date of enactment of this Act, and shall be heard by the court on an expedited basis. If such a claim is filed and the court grants judgment for the plaintiff(s), the court shall award such relief as it deems proper, and shall award costs and attorneys' fees to the plaintiff(s). Any judgment of the court shall be subject to appeal on the same basis that other judgments of that court are subject to review under existing law.

San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub.L. No. 102- 575, tit. XXXVII, § 3709(f)(1), 106 Stat. 4740 (1992) (emphasis added). Amici argue that the Districts relinquished their status as CAP contractors--and correspondingly, their standing to sue under the SCAT Act--when they waived all of their rights to non-Indian agricultural CAP water pursuant to the 1993 amendments to their subcontracts. This argument lacks merit. Assuming that these amendments were binding, none of them purported to terminate the Districts' subcontracts with CAWCD.[10] Although Congress did not define the term "contractor" in the SCAT Act, a reasonable construction of the term would include all entities that had contracted for residual CAP water at the time of the Act--even those who, like the Districts, subsequently amended

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[10]Quite to the contrary, the terms of the amendments made clear that the parties did not intend to extinguish Districts' rights to seek redress for any taking that the SCAT Act effectuated. Although the intention of the parties is not dispositive of the issue of standing because the parties may not confer Article III jurisdiction on this court, each of the Districts signed CAWCD proposals which stated: "Nothing herein is intended to require or imply that [Districts have] waived any rights or claims which [they] may have against the United States pursuant to § 3708(f) of the [SCAT Act]."

their subcontracts. And even if the Districts no longer have any contractual right to draw residual CAP water, that fact would bear on the assessment of damages, not the question of liability.

[7] Second, amici argue that the Districts lack standing because they failed to show an actual injury, maintaining that the Districts have not demonstrated an actual reduction in the amount of CAP water available to them so far. The amici underestimate the breadth of the SCAT Act's waiver of sovereign immunity. The SCAT Act did not require a CAP allottee to prove that Congress's compromise with the San Carlos Apache Tribe made less water available to him. Instead, the SCAT Act waived sovereign immunity to any "claim that the reallocation of water to the Tribe pursuant to [this] Act has unlawfully deprived the [CAWCD] or other contractors of CAP water *of legal rights to such water*." San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub.L. No. 102-575, tit. XXXVII, § 3708(f)(2), 106 Stat. 4740 (1992) (emphasis added). The Districts allege that, by reallocating the excess Ak-Chin water to the CAP, the Ak-Chin Settlement Act automatically reallocated that water to the non-Indian agricultural pool, which water the Districts had purchased under their 1984 subcontracts. If the Districts are correct in their assertion that the excess Ak-Chin water defaulted to them, then the SCAT Act's reallocation of the excess Ak-Chin water to a higher-priority user directly decreased the size of the non-Indian agricultural users' allocations and indirectly deprived the Districts of water due them in their subcontracts. Because a higher-priority right to a CAP water allocation is more valuable than a lower-priority right to the same water, the Districts adequately have alleged that the SCAT Act deprived them of their legal rights to the excess Ak-Chin water allocation.

[8] Third, amici argue that any damage that the Districts may sustain in the future is "conjectural or hypothetical" because their subcontracts only entitled them to an annual percentage of an uncertain amount of residual CAP water. Although we

recognize that the extent of the Districts' injury is not easily measured, determining the harm they may suffer is not merely guesswork. If the SCAT Act reallocated water that became the Districts' property under the Ak-Chin Settlement Act, then the harm is certain even though its precise valuation may not be. Nor does the ebb and flow of the CAP water supply or the fact that the Districts' losses cannot be measured to the ultimate drop render their past damages speculative. The Supreme Court expressly has declined to hold that "the absence of specificity as to the amount of water to be taken prevents the assessment of damages." *Dugan v. Rank*, 372 U.S. 609, 623, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963).[11] And because the Districts' subcontracts oblige them to repay some portion of the CAP's construction costs, any reduction in the non-Indian agricultural pool's allocation would reduce the maximum amount of CAP water and would limit the revenues that the Districts could generate to repay those contractual obligations. We have found standing in similar circumstances. *See Central Ariz. Water Conservation Dist. v. United States Envtl. Protection Agency*, 990 F.2d 1531, 1539 (9th Cir.1993) (holding that the CAWCD had standing to litigate an EPA rule that would require a hydroelectric plant on the Colorado River to buy and install emissions-control devices, where the Bureau of Reclamation owned the plant and the CAWCD was obliged to pay a share of the Bureau's costs).

In sum, the Districts have alleged a concrete injury. The amici do not allege that the other standing requirements are absent, but the Districts have established that the SCAT Act caused any injury they may have suffered, and that we have the power to redress such an injury. See *Hickman*, 81 F.3d at 101.

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[11]The Court noted further that although "the Government did not announce that it was taking water rights to a specified number of 'gallons' or, for that matter, 'inches' of water, we do not think that this quantitative uncertainty precludes ascertainment of the value of the taking." *Id.*

Because the Districts have standing to sue under the SCAT Act, we must reach the merits of this case.

III.

The Districts insist that Congress abrogated their subcontracts with the CAWCD by directing the Secretary to reallocate the excess Ak-Chin water to the San Carlos Apache Tribe in the SCAT Act. The federal government may not deprive a person of "property without due process of law." U.S. Const. amend. V. To demonstrate a wrongful taking, the Districts must show two things. First, the Districts must demonstrate a protected property interest in the excess Ak-Chin water. *See Peterson v. United States Dep't of the Interior*, 899 F.2d 799, 807 (9th Cir.1990). Second, if the Districts can show a protected interest in the excess Ak-Chin water, they must show that the SCAT Act substantially impaired their contractual rights to that property. *See National R.R. Passenger Corp. v. A.T. & S.F.R. Co.*, 470 U.S. 451, 472, 105 S.Ct. 1441, 84 L.Ed.2d 432 (1985).

The Districts allege that their property interest in the excess Ak-Chin water springs from *both* their 1983 subcontracts with the CAWCD, and from the Ak-Chin Settlement Act. The Districts' subcontracts can be the wellspring of property rights. *See id.* at 465-66, 105 S.Ct. 1441; *see Madera Irrig. Dist. v. Hancock*, 985 F.2d 1397, 1401 (9th Cir.1993) (holding that "a valid contract right of an irrigation district against the United States is property protected by the Fifth Amendment"). Because we are asked to construe the Districts' subcontracts, we must interpret them "against the backdrop of the legislative scheme that authorized them, and ... in light of the policies underlying the controlling legislation." *Peterson*, 899 F.2d at 807. Likewise, the Ak-Chin Settlement Act could have conferred on the Districts a property interest in the excess Ak-Chin water. *See Dodge v. Board of Educ. of City of Chicago*, 302 U.S. 74, 78, 58 S.Ct. 98, 82 L.Ed. 57 (1937) (stating that the government can incur contractual obligations "where a statute confirms a

settlement of disputed rights and defines its terms") (footnote omitted).

[9] The Districts' claim to a property right in the excess Ak-Chin water boils down to two observations and an inference. First, the Districts note that the 1983 notice provides that "[t]he CAP water allocations to the non- Indian agricultural users shall include the remaining supplies and are expressed as percentages of water available to non-Indian agriculture." CAP Water Allocations, 48 Fed.Reg. 12446, 12449 (1983). Next, the Districts point out that the Ak-Chin Settlement Act directs the Secretary to "allocate" the excess Ak-Chin water "on an interim basis to the Central Arizona Project" without naming a specific allottee or class of allottees. Act of Oct. 19, 1984, Pub.L. 98-530, § 2(k), 98 Stat. 2698, 2702 (1984). From these two textual observations the Districts urge us to infer that, under the terms of the 1983 notice, allocating water to the "Central Arizona Project" rather than to a specific user or user class automatically and irrevocably would allocate that water to the non-Indian agricultural pool.

[10] Whether this inference legitimately may be drawn depends upon our construction of the Ak-Chin Settlement Act. In particular, we must determine what Congress intended when it designated the "Central Arizona Project" as the recipient of the excess Ak-Chin water. "When interpreting a statute, we look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress." *Hockings*, 129 F.3d at 1070 (citation and internal quotation marks omitted). Upon scrutiny of the language in and the policy behind the Ak-Chin Settlement Act, as informed by the legislative structure of the CAP, we conclude that the Act gave the Districts no property right in the excess Ak-Chin water.

First, no language in the Ak-Chin Settlement Act supports the inference that water allocated to the "Central Arizona Project" would fall to the Districts' portions. When Congress

directed the Secretary to allocate the excess Ak-Chin water to the "Central Arizona Project," it used a term defined by statute. Under 43 U.S.C. § 1521, the CAP is a multitude of canals and aqueducts radiating from dams and reservoirs. And in the practical language of the 1983 notice, the CAP is the sum of all the allocations. Neither Congress nor the Secretary ever equated the CAP with one priority pool or a particular user. Whenever Congress has wished to allot water to a specific CAP priority pool or CAP user, it has used clear language to do so.[12] Congress's failure to designate a specific user or user class convinces us that, even if the excess Ak-Chin water generally was available to the Districts before 1992, the Ak-Chin Settlement Act conferred upon them no protectable property interest. *See Central Mont. Elec. Power Coop. v. Administrator,* 840 F.2d 1472, 1477 (9th Cir.1988) (stating that "[i]f Congress intended to establish a Montana preference for Libby power, it would have expressly set forth a preference as it did when it authorized construction of the Hungry Horse Dam").[13]

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[12]*See* Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub.L. 100-512, § 11(h), 102 Stat. 2549 (1988) (stating that "the Secretary shall reallocate such water for non- Indian agricultural use"); *see* San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub.L. No. 102-575, tit. XXXVII, § 3704(a), 106 Stat. 4740 (1992) (directing the Secretary to reallocate the excess Ak-Chin water "for the exclusive use of the [San Carlos Apache] Tribe").

[13]Ordinary contract law principles dictate that *incidental* beneficiaries may not sue on contract. See Rest. of Contracts § 133(1)(c) (1932). Analogously, those who receive a windfall from a federal settlement will not be heard to complain that a taking has occurred when the law subsequently is changed. *See Dodge*, 302 U.S. at 79, 58 S.Ct. 98 (stating that "[i]f, upon construction of a statute, it is found that the payments are gratuities, involving no agreement of the parties, the grant of them creates no vested right") (footnote omitted).

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Second, the Districts' interpretation of the Ak-Chin Settlement Act finds no support in the meager policy articulated in the Act, whose sole stated objective was to secure for the Ak-Chin Tribe a permanent water supply. *See* Act of Oct. 19, 1984, Pub.L. 98-530, § 1, 98 Stat 2698 (1984). Nor can the Districts' interpretation of the Ak-Chin Settlement Act be squared with the policies and the design of the CAP. As a matter of policy, the CAP was created "[f]or the purposes of furnishing irrigation water and municipal water supplies to the water-deficient areas of Arizona ... control of floods, conservation and development of fish and wildlife resources, enhancement of recreation opportunities, and for other purposes." 43 U.S.C. § 1521(a) (1998). The other purposes include ensuring the repayment of the CAP's own construction and operation costs, and keeping as little of the Colorado River as possible from evaporating or flowing unused into the Sea of Cortez. *See* 43 U.S.C. §§ 423(e), 1524(c) (1998). These purposes are furthered by the Secretary's trickle-down construction of the CAP, which aims to maximize CAP use (and incidentally, to minimize waste) by prioritizing the contract rights of allottees. *See* CAP Water Allocations, 48 Fed.Reg. 12446, 12449 (1983). Anticipating

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The Districts never were more than incidental beneficiaries of the Ak-Chin Tribe's settlement with the government. The Districts were not parties to the Ak-Chin Settlement Act. The United States was not settling a "debt" with the Districts in the Ak-Chin Settlement Act, nor did the Districts provide some other independent consideration for Congress's dispensation of the excess Ak-Chin water to the CAP. In these circumstances, the Districts can claim no property right that can withstand Congress's legislative authority. *See Bowen v. Public Agencies Opposed to Social Security Entrapment,* 477 U.S. 41, 55-56, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986); *see Peterson*, 899 F.2d at 811. Congress's assignment of the excess Ak-Chin water to the "CAP" rather than to the Districts or their priority pool is at best weak evidence of any intent to benefit the Districts, even in light of the wrangling over the Yuma-Mesa Division water.

urban growth and a concomitant decline in agriculture in Arizona, the Secretary gave cities and tribes more secure water entitlements than those possessed by the non-Indian agricultural users. *See* CAP Water Allocations, 48 Fed.Reg. 12446, 12451 (1983) (stating that the supply available to non- Indian agricultural allottees would "decrease during the project life"). These purposes are best served by cycling CAP water allocations rights through the whole priority structure rather than by vesting them at the lowest level of that structure, particularly because the non-Indian agricultural pool historically has underutilized its allotments, and has been able to pay less than the other pools for the water that it has utilized. *See generally* Robert J. Glennon, *Coattails of the Past: Using and Financing the Central Arizona Project,* 27 Ariz. St. L.J. 677 (1995) (discussing non-Indian agricultural users' underuse of their allotments and the downward pressure on prices charged of those users relative to the prices charged of municipal and industrial allottees). The Districts' interpretation of the Ak-Chin Settlement Act as giving them a permanent priority entitlement to the excess Ak-Chin water is simply untenable in light of these objectives. As a matter of design, neither contract rights nor allocations automatically default to users by ordinary operation of the CAP. When a user does not contract to receive all the water available to him under his allocation, his right to contract for that water devolves upon the *Secretary*.[14] And post-1983 allocations to the CAP do not fall to a particular user or user class, but remain at the Secretary's discretionary disposal, because the users' allotments were predicated on the amount of water in the CAP

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[14]The 1983 notice provides that "the Secretary of the Interior will retain the right to contract for water sales on an interim basis where water allottees are not utilizing the[ir] full CAP allotment[s]." CAP Water Allocations, 48 Fed.Reg. 12446, 12449 (1984). We emphasize that the right to contract for unwanted water belongs to the Secretary, not any one user; and this right affects contracts, not allocations.

in 1983.[15] The way that the Secretary has treated the excess Ak-Chin water between the two Indian water rights settlements is faithful to the CAP allocation structure as we have described it.[16] To hold that the excess Ak-Chin water falls automatically to the Districts would turn the CAP's system of priorities on its head.

[11] Only by ignoring the language and purpose of the Ak-Chin Settlement Act, and only by forgetting the policies and design of the CAP could we conclude that the Districts enjoyed an interest in the excess Ak-Chin water. But even then the Districts could claim no enduring property right unless that interest rose to the level of an entitlement. *See City of Santa Clara v. Andrus,* 572 F.2d 660, 676 (9th Cir.1978). Because the Districts allege that their subcontracts and the settlement *together* created their property interest, they are not entitled to the excess Ak-Chin water unless they prove two things. First, the Districts must prove that Congress eliminated the

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[15]The 1983 notice made it abundantly clear that the lodestar of the non-Indian agricultural pool's allocation always would be whatever supply "remained" after the original round of allocations. *See* CAP Water Allocations, 48 Fed.Reg. 12446, 12449 (1983) (stating that the non- Indian agricultural pool's "allocation for years subsequent to [the original allocation in the 1983 notice] *will be based on the [allocation in the 1983 notice] minus the supply ... removed from irrigation"*) (emphasis added).

[16]The Secretary has not behaved in any way consistent with the Districts' assertion that water allocated to the CAP flowed directly into the non-Indian agricultural pool. Specifically, the Secretary never treated the Districts as having automatic access to this or any other water allocated to the "Central Arizona Project." Quite to the contrary, the Secretary publicly treated the excess Ak-Chin water as remaining in the Indian priority pool between the Ak-Chin Settlement and the SCAT Acts. *See* CAP Reallocation Decision, 57 Fed.Reg. 4470, 4476 (1992) (in which the Secretary stated that "[t]he 'excess Ak-Chin water' has been and continues to be considered as Indian water").

Secretary's discretion to reallocate the excess Ak-Chin water.[17] *See id.* Out of respect for the Secretary's broad discretionary authority over the waters of the Colorado River,[18] we assume that "had Congress intended to fetter the Secretary's discretion, it would have done so in clear and unequivocal terms." *Id.* at 667 (quoting *Arizona v. California,* 373 U.S. at 580, 83 S.Ct. 1468). Second, the districts must demonstrate that Congress clearly foreclosed its own prerogative to order that water reallocated in subsequent legislation. Ordinarily, "contractual arrangements, including those to which a sovereign itself is party, remain subject to subsequent legislation by the

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[17]The Districts do not seriously dispute that the Secretary retained his discretion to allocate and reallocate CAP water under the 1983 notice and under their subcontracts with the CAWCD. In effect the Districts conceded that the 1983 notice preserved the Secretary's discretion to reallocate CAP water when they argued in their briefs that Congress *eliminated* the Secretary's discretion to reallocate the excess Ak-Chin water in the Ak-Chin compromise. The language of the 1983 notice makes crystal clear that the Secretary's discretion over the CAP includes the power to allocate CAP water. *See* CAP Water Allocations, 48 Fed.Reg. 12446, 12450 (1983) (stating that "[t]he Secretary of the Interior has the responsibility for allocating CAP waters"). In fact, the Secretary specifically informed allottees that he intended to retain his authority to *reallocate* CAP water even after the notice of "final" water allocations. *See* CAP Water Allocations, 48 Fed.Reg. at 12447 (stating that, after a six-month contracting period, the Secretary for the Arizona Department of Water Resources would recommend that the Secretary of the Interior "reallocat[e] any remaining M & I or non-Indian agricultural water not contracted for during the initial contract period"); *see* CAP Reallocation Decision, 57 Fed.Reg. 4470, 4471 (1992) (confirming that "[t]he 1983 notice provided for a reallocation of the CAP water after an initial round of water service contracting had been completed.")

[18]The Secretary "is vested with considerable control over the apportionment of Colorado River waters." *Arizona v. California,* 373 U.S. at 593, 83 S.Ct. 1468. The Secretary's generous measure of discretion survived the Colorado River Basin Project Act, which directed him to "construct, operate, and maintain" the CAP. *See* 43 U.S.C. § 1521(a).

sovereign." *O'Neill v. United States,* 50 F.3d 677, 686 (9th Cir.1995). Because we are wary of constructions that would give government contracts the force of indelible laws, we assume that "[t]he sovereign's power to enact subsequent legislation affecting its own contractual arrangements endures, albeit with some limitations, unless surrendered in unmistakable terms." *Peterson*, 899 F.2d at 808 (quoting *Bowen*, 477 U.S. at 52, 106 S.Ct. 2390 (internal quotation marks omitted)).

The Districts argue that Congress limited the Secretary's discretion to reallocate the water when it stated that he "shall *allocate* ... on an *interim* basis "the excess Ak-Chin water from the Ak-Chin Tribe "to the Central Arizona Project." Act of Oct. 19, 1984, Pub.L. 98-530, § 2(k), 98 Stat 2698 (1984) (emphasis added). This argument simply does not wash. Even if the term "Central Arizona Project" were synonymous with the non-Indian agricultural pool--an interpretation we already have rejected--nothing in the Ak-Chin Settlement Act prevents the Secretary from reallocating CAP water from the Central Arizona Project to a particular CAP user. In fact, the Ak-Chin Settlement Act actually reaffirms the Secretary's CAP allocation power. By directing the Secretary to allocate CAP water, Congress actually underscored the Secretary's undisputed allocation *authority*.[19] By instructing the Secretary to allocate the excess Ak-Chin water to the "Central Arizona Project" rather than to specific users such as the Districts, and by using the phrase "interim basis" rather than some specific or permanent duration, Congress preserved the Secretary's

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[19]The Ak-Chin Settlement Act provided that "[n]othing in this Act shall be construed to enlarge or diminish the authority of the Secretary with regard to the Colorado River." Act of Oct. 19, 1984, Pub.L. 98-530, § 8, 98 Stat 2698 (1984). Read in light of this provision, Congress's mandate that the Secretary reallocate the excess Ak-Chin water confirms that the Secretary had the discretion to reallocate CAP water after the 1983 allotments.

allocation *discretion*.[20] For these reasons, we hold that the Ak-Chin Settlement Act did not divest the Secretary of his discretion to allocate the excess Ak-Chin water when it instructed him to allocate that water "on an interim basis to the Central Arizona Project." Act of Oct. 19, 1984, Pub.L. 98-530, § 2(k), 98 Stat 2698 (1984).

Nor have the Districts shown that Congress relinquished in "unmistakable terms" its own power to order the excess Ak-Chin water reallocated. Because we have concluded already that the Ak-Chin Settlement Act does not limit the Secretary's discretion, to conclude that the language of that Act surrenders Congress's own prerogative to order a reallocation would not be unmistakable, but unthinkable. But even if we were persuaded that the phrase "shall allocate" in the Ak-Chin Settlement Act somehow limited the Secretary's discretion to reallocate the excess Ak-Chin water, neither that phrase nor any other language in the Act purports to limit Congress's power to command a reallocation later. In fact, the terms of the Districts' subcontracts show that the parties anticipated legal changes and agreed to limit the government's liability for shortages, whatever their cause. In circumstances like these, we have held that water reclamation contracts are not immune to subsequent statutory modifications. *See O'Neill,* 50 F.3d at 686 (finding that Congress had not unmistakably waived its right to amend the amount of water it was obligated to deliver pursuant to water service contracts where "[t]he contract contemplates future

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[20]We note that Congress knows what language to use when it wants to give an allottee a property entitlement to CAP water. *See* San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub.L. 102-575, tit. XXXVII, § 3704(a), 106 Stat. 4740 (1992) (directing the Secretary to "reallocate [CAP water] for the exclusive use of the Tribe"); *see* Act of Oct. 19, 1984, Pub.L. 98-530, § 2(f)(1), 2(k), 98 Stat. 2698 (directing the Secretary to reallocate a "permanent supply" of water for the "exclusive use" of the Ak-Chin Tribe).

changes in reclamation laws ... and ... limits the government's liability for shortages due to any causes").

In sum, the Districts have not demonstrated that the Ak-Chin Settlement Act automatically brought the excess Ak-Chin water allotment within the allocation of the non-Indian agricultural pool. The language of the Ak-Chin Settlement Act as well as the CAP's purposes and structure rather point to the contrary conclusion. And even if the Districts somehow did acquire a provisional right to the excess Ak-Chin water allotment, they have not demonstrated that Congress intended for that right to be irrevocable. Congress did not foreclose the Secretary's discretion, and it did not relinquish its own legislative prerogative. For these reasons, we conclude that the Districts have demonstrated no protected property interest in the excess Ak-Chin water allocation. Because the Districts have not shown that they had any property right to the excess Ak-Chin allocation that the SCAT Act could have substantially impaired, our inquiry is complete. *See Barcellos and Wolfsen v. Westlands Water Dist.*, 899 F.2d 814, 821 (9th Cir.1990).

CONCLUSION

For the foregoing reasons, we reverse the district court's grant of summary judgment to Plaintiffs. Plaintiffs' motion for attorneys' fees on appeal is denied.

REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARICOPA-STANFIELD IRRIGATION AND DRAINAGE DISTRICT, a municipal corporation of the State of Arizona,
Plaintiff-Respondent,
vs.
BRUCE BABBITT, Secretary,
United States Department of Interior,
Defendant-Petitioner.

No. 97-80303
DC# CV 94-2188-SMM
Arizona (Phoenix)

Filed July 31, 1997

ORDER

Before HUG, Chief Judge, and LEAVY, Circuit Judge.

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is granted. Within 10 days of this order, petitioner shall perfect the appeal pursuant to Federal Rule of Appellate Procedure 5(d).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

MARICOPA-STANFIELD IRRIGATION and DRAINAGE DISTRICT, et al.,

Plaintiffs,

v.

BRUCE BABBITT, SECRETARY, UNITED STATES DEPARTMENT OF INTERIOR,

Defendant.

CIV 94-2188-PHX-SMM

MEMORANDUM OF DECISION AND ORDER

I. BACKGROUND

The Colorado River Basin was divided by the 1922 Colorado River Compact into Upper and Lower Basins that joined at Lee Ferry. Arizona is included in the Lower Basin and in the 1928 Boulder Canyon Project Act received 2.8 million acre-feet ("A.F.") of the Colorado River's normal flow of 7.5 million A.F. 43 U.S.C. §§ 617(c), 617(l) (a). In 1944, the United States contracted with Arizona to supply its 2.8 million A.F. allocation during normal years. Arizona's water entitlement and contract were later confirmed by the Supreme Court in *Arizona v. California,* 373 U.S. 546 (1963).

The Colorado River Basin Project Act of 1968, Pub. L. No.90-537, 43 U.S.C. §§ 1501-1556 ("Basin Project Act") , authorized the Bureau of Reclamation to construct the Central Arizona Project ("CAP"), a $4 billion multi-purpose development project, which enables the State of Arizona to divert and use its allocation of Colorado River water. The project was authorized by Congress for the purpose of furnishing water supplies for irrigation and municipal and

industrial uses to water deficient areas in Arizona and western New Mexico, and for other purposes. *Id.*

The State of Arizona created a single agency to contract with the United States to repay the reimbursable costs of the CAP. The Arizona Legislature enacted and the Governor approved Laws 1971, Ch. 50, A.R.S. §§ 48-3701 to 48-3718, authorizing Maricopa, Pinal, and Pima counties to petition to create the Central Arizona Water Conservation District ("CAWCD") with the power to levy assessments on all taxable property within its boundaries and to enter into contracts with the United States. The petition was approved, creating CAWCD, which encompasses Maricopa, Pinal, and Pima counties, exclusive of Indian lands within their boundaries.

On December 15, 1972, the United States entered into a combined water service and repayment contract with CAWCD entitled "Contract Between the United States and the Central Arizona Water Conservation District for Delivery of Water and Repayment of Costs of the Central Arizona Project" ("Master Repayment Contract") in which CAWCD agreed to repay $1.2 billion in costs for the construction of water delivery facilities. *Central Arizona Irr. & Drainage Dist. v. Lujan,* 764 F.Supp. 582, 585 (D. Ariz. 1991).

The Basin Project Act authorized the Secretary of the Interior ("Secretary") to allocate Arizona's CAP water supply among various water users within the State of Arizona. 43 U.S.C. § 152; *Lujan*, 764 F.Supp. at 589. On March 24, 1983, the Secretary, upon consultation and recommendations from Arizona's Department of Water Resources ("DWR"), apportioned Arizona's CAP water among three user classes: (1) 309,828 A.F. annually to twelve Indian Tribes; (2) 638,823 A.F. annually to municipal and industrial users ("M & I users"); and (3) the remainder to non-Indian agricultural users on an individual percentage basis. Notice of Final Water Allocations to Indians and Non-Indian Water Users and Related Decisions ("1983 Allocation Decision"), 48 Fed.Reg. 12446. During years

of water shortage, Indian users and M & I users would share a priority on project water supplies. *Id.* All allocations were confirmed in delivery contracts.

Plaintiffs Maricopa-Stanfield Irrigation District, Central Arizona Irrigation and Drainage District, and New Magma Irrigation and Drainage District are irrigation and drainage districts and Arizona municipal corporations located in Maricopa and Pinal counties in Arizona and are users of CAP water. Plaintiffs were formed, pursuant to Title 48, Chapter 19 of the Arizona Revised Statutes, to distribute water to the lands within their respective services areas. In 1983, each Plaintiff entered into a subcontract with the United States Department of Interior Bureau of Reclamation and CAWCD, for the purchase of water from the CAP residual pool. *Lujan*, 764 F.Supp. at 585. Plaintiffs are collectively scheduled to receive forty-three percent of the CAP non-Indian agriculture supply. *Id.* Plaintiffs also assumed the obligation to pay back the costs of construction of facilities used to deliver their CAP water, with twenty percent paid up front. *Id.*

Not all Colorado River water used in Arizona is part of the CAP supply. This case is centered upon 50,000 A.F. of water derived from the Yuma-Mesa Division of the Gila Project which had rights prior to the creation of the CAP to 300,000 A.F. When the CAP was created, the Secretary was required to respect the rights of users on the Colorado River, such as the Yuma-Mesa Division, who had existing contract entitlements or Indian water rights in the river. P.L. 90-537, § 301(b). These pre-existing rights have priority over the rights of CAP water users. *Id.* Yet, because the Yuma-Mesa Division never used 50,000 A.F. of the 300,000 A.F. to which it was contractually entitled, the DWR counted those unused 50,000 A.F. as a firm part of the water supply dedicated to the CAP, and reflected them in the recommendations the DWR made to the Secretary to consider in the 1983 Allocation Decision.

The first in a series of disputes leading to the present case arose when the Secretary, after making CAP allocations and accompanying water delivery contracts, realized that more water was needed to fulfill the United States' commitments to the Ak-Chin Indian Community. Since the CAP allocations and contracts were already completed, the Secretary had to either find "new water" that had not been allocated already or obtain some of the previously contracted-for water from the Colorado river. The Secretary decided to utilize the 50,000 A.F. of unused Yuma-Mesa Division water to fulfill its water obligations to the Ak-Chin Indian tribe, apparently without realizing that the Secretary had factored the 50,000 A.F. of unused Yuma-Mesa Division water into the original CAP supply. Correspondence from James Watt, Secretary of the Interior to Representative Morris D. Udall (October 7, 1983) . In his recommendations to Congress, the Secretary operated under the belief that only the Yuma-Mesa Division would be directly affected by transferring the 50,000 A.F. *Id.*

Thus, a dispute arose over rights to the 50,000 A.F. of water from the Yuma-Mesa Division. Then-Arizona Governor Bruce Babbitt expressed his concern over the proposed Ak-Chin settlement:

> The new agreement is based on the mistaken understanding that currently unused Colorado River contractual entitlement [50,000 A.F. of unused Yuma-Mesa Division water] can be redirected to use on the Ak-Chin reservation without adversely affecting CAP water supplies.

Correspondence from Bruce Babbitt, Governor, State of Arizona to James Watt, Secretary of the Interior (November 1, 1983), Pls' Exh. 13. In addition, Wesley E. Steiner, head of the DWR, also pointed out the Secretary's erroneous assumptions regarding the Yuma-Mesa Division water:

> The rub is that the Yuma-Mesa Division has never used more than 250,000 acre feet per

> annum . . . . Since this "entitlement" has now existed for 37 years without having been exercised, we assumed in our CAP water supply studies that this acreage never would be developed . . . and, hence, was part of the supply available to the CAP. This 50,000 acre feet per annum then was relied upon in the allocation recommendations advanced to the Secretary as the firmest part of the supply available to M & I users and to the Indians in central Arizona.

Correspondence from Wesley E. Steiner, Director, Arizona Department of Water Resources to Buck O'Rielly (Sept. 12, 1984), Pls' Exh. 14. Arizona's primary concern was that if the 50,000 A.F. were permanently allocated to the Ak-Chin Indian Community the overall CAP supply would be reduced, depending on the total supply available to be allocated to CAP users. Non-Indian agricultural users, like the Plaintiffs, would be affected first since allocations to the Indian and M & I users must be met first and any reduction in overall CAP supply would immediately effect the amount of water in the residual pool contracted for by non-Indian agricultural users. Once the residual pool was completely exhausted, the M & I users and Indian users would be affected. With less of a residual pool available, the M & I users were concerned that their potential exposure to any shortage was heightened. Compounding the problem, the Yuma-Mesa Division disputed CAP's or the federal government's right to utilize the 50,000 A.F.

The dispute was ultimately resolved by compromise. The Yuma-Mesa Division was compensated for the loss of entitlement to the 50,000 A.F. Section 2(g) of the Ak-Chin Settlement Act, 98 Stat. 2700. The Secretary and State of Arizona agreed that the Yuma-Mesa Division's unused 50,000 A.F. could be used for the Ak-Chin Indian Community as long as the Secretary agreed to return all surplus water not needed to fulfill the obligations of the Secretary under the Act (33,000

A.F. in a normal year) to the general CAP pool. *Id.* at 2(k), 98 Stat. at 2701.

Therefore, under the Ak-Chin Settlement Act, as amended by P.L. 98-530, 98 Stat. 2698 *et seq.*, Congress directed the Secretary to deliver to the Ak-Chin Indian Community annually a permanent supply of not less than 75,000 A.F. of water. *Id.* at § 2(a), 98 Stat. at 2698. The Ak-Chin Indian Community is entitled to receive 85,000 A.F. when sufficient water is available. *Id.* at § 2(b), 98 Stat. at 2698 99. Congress specified the sources and the priorities of the water to be delivered to the Ak-Chin Indian Community. First, a permanent supply of 50,000 A.F. of water previously used by the Yuma-Mesa Division is to be annually delivered to the Ak-Chin Indian Community. *Id.* at § 2(f) (1), 98 Stat. at 2699. Second, the CAP water allocated to the Ak-Chin Indian Community by the Secretary in his 1983 Allocation Decision is to be delivered to the Ak-Chin Indian Community as is necessary to fulfill the water obligations described above. *Id.* at § 2(f)(2), 98 Stat. at 2699. The Secretary's CAP allocations provide 58,300 A.F. of water for irrigation annually to the Community. 48 Fed.Reg. at 12447. These two sources give the Ak-Chin Indian Community access to a potential 108,300 A.F. of water to satisfy the 75,000 or 85,000 A.F. of water required in the Ak-Chin Settlement Act. During wet years when there is a sufficient amount of CAP water, there will be an excess of either 33,000 or 23,000 A.F. of water that the Secretary must allocate to CAP.

The statutory provision–that water not required for delivery to the Ak-Chin be allocated to CAP was the result of Congressional debate and subsequent revision of the original version of the Ak-Chin Settlement Act. The House's H.R. 6206 originally gave the Secretary unlimited discretion to contract for the Ak-Chin excess water. However, when H.R. 6202 reached the Senate, Senator Goldwater, introduced an amendment to the bill to "reconfirm the fact that any of the surplus aggregate water which the Secretary of the Interior does not use in

fulfilling his obligation to the (Ak-Chin) Indians goes to the central Arizona project." Pls' Ex. 19, Congressional Record, Vol. 130, No. 122, S11837. Senator DeConcini agreed, stating that "[t]hese amendments in no way affect the water rights assigned to the Ak-Chin community . . . but instead will provide mechanisms to allow the State to recover a portion of the water that will be lost as a result of the new water settlement." *Id.* at 11837-38. Senator DeConcini also confirmed that the 50,000 A.F. of water being transferred to the tribe from the Yuma-Mesa Irrigation District had been factored into the State's allocations for CAP water. *Id.* Representative Udall stated that the second amendment "clarifies that the balance of the water not needed to fulfill the Secretary's specific delivery obligations to the Ak-Chin shall be allocated to the central Arizona project." Pls' Ex. 20, Congressional Record, Vol. 130, No. 129, H10880-81. Mr. Udall further stated that water from those sources in excess of the community's settlement "shall be allocated by the Secretary to the CAP." *Id.* Lastly, then-Congressman McCain stated as follows:

> As passed by the Senate, H.R. 6206 contains amendments by Senators Goldwater and DeConcini that address concerns expressed by the State and other water users. I believe these amendments should be agreed to by the House. In short, the Senate amendments limit the amount of irrigated acreage in the Yuma-Mesa irrigation district, ensure that any water surplus to the Ak-Chin's settlement would be available only to the central Arizona water conservation district for CAP purposes, and establish a trust fund to buy water from agricultural users along the Colorado River to guarantee the Ak-Chin supply in dry years.

Id.

The Ak-Chin Settlement, states, in pertinent part:

> The water referred to in subsection (f)(1) shall be for the exclusive use and benefit of the Ak-Chin Indian Community, except that whenever the aggregate water supply referred to in subsection (f) exceeds the quantity necessary to meet the obligations of the Secretary under this Act, the Secretary shall allocate on an interim basis to the Central Arizona Project any of the water, referred to in subsection (f) which is not required for delivery to the Ak-Chin Indian Reservation under this Act.

Pub. L. 98-530, 98 Stat. at 2701, ¶ 2(k). Thus, Congress settled the dispute over rights to the 50,000 A.F. of Yuma-Mesa Division water.

Yet, the excess water from the Ak-Chin Settlement Act came into dispute once again when Congress considered it as a possible source to settle water claims made by the Fort McDowell Indian Community. Congress, however, rejected the use of the Ak-Chin excess water to satisfy the federal government's obligations to the Fort McDowell Indian Community:

> The Committee notes that the so-called "Ak-Chin surplus" water is not included in the substitute as a potential source of water for the Fort McDowell settlement in section 6 of H.R. 5063 as introduced. This source was removed in response to the testimony of numerous witnesses, including those from the Administration, Arizona's Department of Water Resources, the CAWCD, and municipal and agricultural entities in Maricopa and Pinal counties that Ak-Chin water would not be appropriate or acceptable for use in the Fort McDowell settlement.

H.R. Rep. No. 778, 101st Cong., 2d Sess. 23 (1990).

Finally, the dispute giving rise to the case arose when Congress permanently reallocated the Ak-Chin surplus water to the San Carlos Apache Tribe. San Carlos Apache Tribe Water Rights Settlement Act of 1992 ("SCAT Act"), Title XXXVII of Pub. L. 101-575, § 3701 *et seq.*, 106 Stat. 4740 *et seq.* Again, the same parties opposed use of the Ak-Chin excess water. In an apparent response to the opposition, Congress waived sovereign immunity and authorized an action by parties who were damaged by its reallocation of the surplus water. *See id.* at § 3708(f)(1).

The parties in this action cite to essentially the same facts, but dispute the legal meaning of them. Plaintiffs claim that in enacting the SCAT Act, Congress took the Plaintiffs' rights to receive the surplus Ak-Chin Settlement water without compensation, violating the Fifth Amendment Takings Clause. Plaintiffs assert that if the Ak-Chin excess water was part of the general CAP supply, it was automatically committed by the Secretary's prior allocations and contracts to the Districts and other CAP users, and could not be taken for use in the San Carlos Apache Tribe settlement without payment of just compensation. Defendant claims that the Plaintiffs had no protectable property rights in the surplus water, and that even if they did, they cannot prove damages without resorting to speculation.

Pending before the Court are Defendant's Motion for Summary Judgment and Plaintiffs' Partial Motion for Summary Judgment. The motions are fully briefed and the Court heard oral argument on July 22, 1996.

II. STANDARD OF REVIEW

A court must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the nonmoving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (1995); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986);

Jesinger v. Nevada Federal Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994). Substantive law determines which facts are material. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986); *see also Jesinger*, 24 F.3d at 1130. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. The dispute must also be genuine, that is, "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*; *see also Jesinger*, 24 F.3d at 1130.

A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex*, 477 U.S. at 32-24. Summary judgment is appropriate against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322; *see also Citadel Holding Corp. v. Roven, 26* F.3d 960, 964 (9th Cir. 1994) . The moving party need not disprove matters on which the opponent has the burden of proof at trial. *Celotex*, 477 U.S. at 317. The party opposing summary judgment "may not rest upon the mere allegations or denials of [the party's] pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 585-88 (1986); *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1049 (9th Cir. 1995).

III. DISCUSSION

A. Jurisdiction

As a jurisdictional basis for this action, Plaintiffs rely upon the grant of jurisdiction contained in Section 3708(f) of the SCAT Act, Pub. L. 102-575, § 3701 *et seq*. Section 3708(f) of the SCAT Act provides as follows:

> (f) Claims. (1) The United States District Court for the District of Arizona and the United States Claims Court are authorized to hear and decide

> any claim brought by the Central Arizona Water Conservation District or other contractors of CAP water . . . .
>
> (2) For- purposes of this subsection, "claim" means a claim that the reallocation of the water to the [San Carlos Apache Indian] Tribe pursuant to section 3704 (a) of this Act has unlawfully deprived the Central Arizona Water Conservation District or other contractors of CAP water of legal rights to such water.

Pub. L. 102-575, § 3708(f).

Section 3704 (a) of the SCAT Act states, in relevant part, that:

> (a) Reallocation of water - the Secretary shall reallocate, for the exclusive use of the Tribe, all the water referred to in subsection (f)(2) of Section 2 of the Act of October 19, 1984 (98 Stat. 2698), which is not required for delivery to the Ak-Chin Indian Reservation under that Act.

Section (f)(2) of Section 2 of the Act of October 19, 1984 (98 Stat. 2698), Pub. L. 98-530, relates to the following water:

> (2) Such Central Arizona Project water allocated to the Community and referred to in the "Notice of Final Water Allocations to Indian and non-Indian Water Users and Related Decisions" (48 Fed. Reg. 12446, March 24, 1983) as is necessary to fulfill the Secretary's water delivery obligations.

Defendant argues that Plaintiffs premise jurisdiction upon a statute that permits suit against the United States only if Plaintiffs' claim can establish the unlawful deprivation of their legal rights to any or all of the 58,300 A.F. of water allocated to the Ak-Chin Tribe in the Secretary's 1983 Allocation Decision. This technical argument attempts to create a legal fiction in order to bar Plaintiffs from bringing this suit. Defendant bases his argument on the Ak-Chin Act's characterization of excess

Ak-Chin water as deriving from the Ak-Chin's 1983 allotment of 58,300 A.F. Of course, Plaintiffs do not argue that they have a right to the Ak-Chin's CAP allotment. Rather, Plaintiffs argue that they have a right to the excess water not needed for delivery to the Ak-Chin pursuant to the Ak-Chin Settlement Act. Nowhere in the authorization to bring suit contained in the SCAT Act does Congress state that suits brought must pertain to the Ak-Chin's 58,300 A.F. CAP allotment. The provenance of the excess water referred to in the SCAT Act's authorization to bring suit is inconsequential to the waiver of sovereign immunity since the statute clearly states that suits may be brought that pertain to the permanent allocation of the Ak-Chin excess water to the San Carlo Apache Tribe. Plaintiffs allege precisely the type of claim that was contemplated by the waiver of sovereign immunity -- that the allocation of the Ak-Chin excess water reduced the residual CAP pool and, hence, harmed the Plaintiffs.

Furthermore, Plaintiffs are one of the parties permitted to bring suit under the waiver contained in the SCAT Act. P.L. 102-575, § 3708(f). Pursuant to the Secretary's 1983 Allocation Decision, Plaintiffs entered into subcontracts with the Bureau of Reclamation of the United States Department of Interior and CAWCD for the purchase of water from the CAP. Plaintiffs are "other contractors of CAP water." *Id.* Plaintiffs assert legal rights and/or a protectable property interest in the excess water derived from the Ak-Chin Settlement Act and, as such, their claim is properly brought pursuant to the Congressional authorization contained in the SCAT Act. Pub. L. 102-575, § 708(f).

Mindful of the jurisprudential principle that "no action is against the United States unless the legislature has authorized it," the Court finds that this suit is authorized under the jurisdictional grant; contained in the SCAT Act. *See Dalchite v. United States,* 346 U.S. 15, 10 (1952); *Feres* v. *United States,* 340 U.S. 135, 139 (1950).

B. Analysis

Though voluminous documents containing statutes and historical background information were submitted with the parties' cross-motions for summary judgment, the determinative issue before the Court is what Congress intended with respect to the excess water compromise contained in the Ak-Chin Settlement Act. P.L. 98-530, § 2(f), 98 Stat. at 2701. Specifically, the Court must determine whether the Ak-Chin Settlement Act allocated the excess water to the general CAP supply or whether the Secretary retained discretion to allocate the excess water at-will. If the Secretary retained discretion over the Ak-Chin excess then, as Defendant argues, Plaintiff cannot show the existence of a property right in the Ak-Chin surplus water essential to establishing a Fifth Amendment takings claim. If, as Plaintiffs argue, the Ak-Chin surplus water was statutorily allocated to the general CAP supply then the water was automatically committed by the Secretary's prior allocations and contracts to the Districts and other CAP users. Hence, the water could not be taken for use in the San Carlos Apache Tribe settlement without payment. Thus, the issue before the Court is whether Congress dedicated the Ak-Chin excess water to the general CAP supply, or whether it gave the water to the Secretary to allocate at will.

1. Deference to Administering Agency's Interpretation

As a preliminary matter, the Court must address the issues alluded to by the Defendant implicating *Chevron USA, Inc. v. NRDC,* 104 S. Ct. 2778 (1984). In *Chevron* the Supreme Court held that where a legislative delegation to an agency on a particular question is implicit rather than explicit, a court may not substitute its own construction of the statutory provision for a reasonable interpretation made by the administrator of the agency. *Id.* at 2782. In this case, the Defendant, Secretary of the Interior, argues that as the administering agent, the Court should grant deference to his interpretation of the Ak-Chin

Settlement Act and the discretionary authority it grants to the Secretary. Yet, the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. *Id.* Therefore, because the Court finds that the congressional intent of the Ak-Chin Settlement Act is clear, as explained more fully below, the Court need not defer to the Secretary's interpretation. *See id.*

2. Secretary's Discretion over Ak-Chin Excess Water

The Ak-Chin Settlement Act directly speaks to the issue of the Secretary's authority over the Ak-Chin excess water. The Ak-Chin Settlement Act states, "the Secretary shall allocate on an interim basis to the Central Arizona Project any of the water, referred to in subsection (f) which is not required for delivery to the Ak-Chin Indian Reservation under this Act." Pub. L. 98-530, 98 Stat. at 270, § 2(k). As Justice Scalia stated in *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 528 (1989) (Scalia, J. concurring):

> The meaning of terms on the statute books ought to be determined not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it); and (2) most compatible with the surrounding body of law into which the provision must be integrated -- a compatibility which, by a benign fiction, we assume Congress always has in mind.

Accordingly, the Court will first interpret the plain meaning of the statute. Then, as this statute does not exist in a vacuum, the

Court will analyze the statute in the context of the surrounding body of law and congressional debate.

The Defendant urges the Court to interpret the statute to mean that Congress, in requiring the Secretary to allocate the excess water to the CAP, gave the Secretary unlimited discretion over the water. The Defendant bases its argument on the fact that the Ak-Chin Act refers to CAP as established by Public Law 90-537, Section 1521 (Colorado River Basin Act, 43 U.S.C. § 1524). *See* P.L. 98-530, § 2(c), 98 Stat. at 2699. In the Colorado River Basin Act, the Secretary of the Interior is given broad discretion in the allocation of the CAP water. *See Lujan*, 764 F.Supp. at 589 (quoting 43 U.S.C. § 1521). Therefore, the Defendant argues that the Secretary retained discretion to allocate the water to any CAP user, including the San Carlos Apache Tribe.

Though the Secretary does have broad discretion to allocate CAP water, Congress may circumscribe that authority. *See id.* In the Ak-Chin Settlement Act, the "shall allocate" language clearly limits the Secretary's authority. Further, the fact that the Secretary must allocate the water to the CAP necessarily implies that there are others outside the CAP that the Secretary may have contracted the water to but, owing to this provision, cannot. Therefore, what is encompassed in the meaning of CAP is critical to evaluating the extent of the Secretary's discretion over the excess water. The crux of the Defendant's argument is that the San Carlos Apache Community, a CAP user, falls within the meaning of the Ak-Chin Settlement Act's reference to CAP and, thus, the Secretary had the authority to permanently allocate the excess water to them.

Therefore, in order to determine whether allocation of the Ak-Chin excess water to the San Carlos Apache Community is within the realm of "CAP" as referred to in the Ak-Chin Settlement Act, the Court must briefly review the structure of CAP allocations and other water rights in Arizona. In Arizona,

water is divided among various priorities of rights. Ranking on the top are rights pre-existing the CAP, such as those held by the Mesa-Yuma Division. P.L. 90-537, § 301(b). The 50,000 A.F. acquired from the Mesa-Yuma Division retained that priority and was meant to provide a firmer base water supply than even the Ak-Chin's CAP allocation could provide. P.L. 98-530, § 2(f)(1), 98 Stat. at 2699. CAP allocations are next on the priority list, but priorities are further divided among CAP user groups. Indian users top the CAP priority list, followed by M & I users and finally non-Indian agricultural users. *See* 48 Fed.Reg. 12446. As is evident from this structure, not all water is CAP water. Also, a CAP user can receive CAP water allocations and contract for water outside the CAP. A CAP user can even contract for CAP water from another CAP user outside the context of the CAP, as is evidenced by the San Carlos Apache Community's sale of the excess water it received from the SCAT Act to M & I users. Nonetheless, within the context of CAP each of the allottees receives the amount that was allotted to them pursuant to the 1983 Allocation Decision and subsequent delivery contracts.

Following the 1983 CAP allocations, the Secretary divided all of the CAP water among the users and entered into delivery contracts. These contracts further circumscribe the Secretary's authority to allocate CAP water. *See Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1401 (9th Cir. 1993) (stating that a valid contract right of an irrigation district against the United States is property protected by the Fifth Amendment). Yet, the Defendant now alleges that any water falling into the residual pool allocated to non-Indian agricultural users may be raided at-will simply because the Secretary has discretion over CAP allocations. This argument does not comport with the Secretary's 1983 Allocation Decision which created a residual pool for non-Indian agriculture. *See* 48 Fed.Reg. 12446. The residual pool is made up of water not required for delivery pursuant to the allotment contracts of the

other CAP users of higher priority. *Id.* Thus, non-Indian agricultural users, such as the Plaintiff, are entitled to all CAP supply water not delivered pursuant to Indian and M & I users allotment contracts.

The Secretary cannot diminish the residual pool simply because the pool bears the risk of natural shortages. Nor does the fact that the Plaintiffs contracted for percentages of water rather than fixed amounts mean that the Plaintiffs have only a unilateral expectation of receiving any of the CAP general pool. To the contrary, non-Indian agricultural users, such as the Plaintiffs, are contractually entitled to all the CAP water not contracted for by other users. *See* 48 Fed.Reg. 12446. If the Secretary had wanted to arrange the CAP so that he could contract for excess water even after contracting with Plaintiffs, he could have done so. Yet, he would have had to do that prior to entering into contracts with the CAP users that essentially contracted for all the CAP water. Defendant is unable to cite to any authority that gives the Secretary the authority to re-allocate water that has already been allocated and committed by contract. As the Ninth Circuit stated, "too liberal an interpretation of the residual sovereign power of the government to override its contractual commitments would eviscerate the government's power to bind itself to contracts." *Madera*, 985 F.2d at 1401.

Once Plaintiffs entered into water contracts with the United States, the Secretary lost any authority to allocate the contracted-for water. Plaintiffs originally entered into their agricultural water contracts on November 21, 1983, wherein they are collectively scheduled to receive forty-three percent of the CAP non-Indian agricultural water supply. *Lujan*, 764 F. Supp. at 585. Those subcontracts were entered into after the Secretary's 1983 Allocation Decision. Pursuant to these contracts, the Plaintiffs must reimburse the federal government for the cost of their water delivery systems with interest. *Id.* Plaintiffs generate this revenue through the purchase and use of

CAP water. *Id.* Yet, the costs of repayment remain fixed regardless of the amount of water they receive. *Id.* If the Secretary could invade the residual pool at will, the Plaintiffs would receive only the residual pool of the residual pool--a precarious position in light of the contractual burdens of repayment. In the arrangement suggested by the Secretary, the Plaintiffs are a steady source of repayment while the Secretary is still free to strike a better bargain for the CAP residual pool.

The suggested arrangement is not supported by the water delivery contracts themselves which state, "the United States shall use all reasonable diligence to make available to the Subcontractor [Plaintiffs] the quantity of Project Water specified in the schedule submitted by the Subcontractor in accordance with Article 4.4." This is not negated by the Master Repayment Contract, section 8.12, which states that the government is not liable if there is a shortage of water available to CAP as a whole. The Plaintiffs bore the risk of water shortages and indeed the whole allocation system was geared to place such a risk upon them. The Plaintiff, however, did not bear the risk that the Secretary would remove water from the general CAP pool to satisfy one if its independent obligations.

The allocation of the excess Ak-Chin water to the San Carlos Apache Community does not fit within the allocation structure and contracts for CAP water. Allocation of the excess water to the San Carlos Apache Community increases their CAP water supply above that which was allocated to them in the Secretary's 1983 Allocation Decision. Such an increase in a CAP allocation to one user necessarily deprives the general CAP pool of water upon which it previously relied. The Ak-Chin Settlement Act's requirement that the Secretary allocate the excess water to the CAP could not mean that the Secretary may allocate the water to any CAP user but, instead, that he may allocate the water to the CAP general pool, according to the previously established allocations and delivery contracts.

In response, Defendants argue that the excess water comes from the Ak-Chin's CAP allocation of 58,300 A.F. that Plaintiffs knew of at the time they executed their subcontracts. According to this argument, since the Plaintiffs knew that this water was allocated to an Indian user, they should have known that the water could be reallocated to another Indian user. To support this proposition the Defendant cites a portion of the 1983 Allocation Decision which states that, "[a]ll water not contracted for, or contracted for but not expected to be utilized during interim periods, will be retained under jurisdiction of the Secretary." 48 Fed.Reg. 12446, 12447. This grant of authority, however, was circumscribed by the clear language of the Ak-Chin Settlement Act which required the Secretary to allocate the excess Ak-Chin water to the CAP general supply. P.L. 98-530, § 2(f), 98 Stat. at 2701.

Congress is presumed to have known the basic rules of statutory construction when enacting legislation. *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 495-97 (1991). If Congress had wanted to grant the Secretary the authority to allocate the water outside of the CAP or utilize the water to increase the allocation of another Indian user, it could have done so. Yet, the clear language of the Ak-Chin Settlement Act grants the excess water to the CAP supply. P.L. 98-530, § 2(f), 98 Stat. at 2701.

Furthermore, though the Plaintiffs knew that the Ak-Chin Indian Community were allotted 58,300 A.F. of CAP water, the Plaintiffs had no idea that the 50,000 A.F. from the Mesa-Yuma Division, counted on when making CAP allocations, would be permanently allocated to the Ak-Chin Indian Community. At least in terms of the Ak-Chin Settlement Act, the Plaintiffs received some benefit. Under the Ak-Chin Settlement Act, the CAP's disputed rights to 50,000 A.F. were converted into settled rights to 33,300 A.F. in a normal year. In the SCAT Act, the Plaintiffs received nothing for the removal

of water from the general CAP pool, except the ability to bring this suit.

The Defendant next argues that if the Court finds that the Defendant must compensate the Plaintiffs for the removal of the Ak-Chin excess water from the general CAP pool, the government is being forced to pay for the same water twice. Defendant argues that in the Ak-Chin Settlement Act the government bought the development rights to the 50,000 A.F. of water from the Yuma-Mesa Division. Further, the Defendant asserts, since the government bought the water, no rights could accrue to other CAP users. Yet, the government previously committed the 50,000 A.F. to the CAP and, then when the dispute arose during the Ak-Chin Settlement, it decided to purchase the water rights to avoid present and future conflict. Also as part of the resolution at disputed rights, the government committed excess water from the Ak-Chin's 1983 CAP allocation of 58,300 A.F. not needed for use by the Ak-Chin back to the CAP general pool to replace the loss of the 50,000 A.F. from the Yuma-Mesa Division. The 50,000 A.F. the government paid for was committed to the Ak-Chin settlement and is not a part of the Ak-Chin excess water now in dispute. Accordingly, Congress is not paying for the same water twice.

It is well-accepted that courts should not rely on statutory history as a basis for refusing to give effect to the plain language of a statute; however, courts may rely on statutory history to solve ambiguity. *See Hubbard v. United States,* 115 S. Ct. 1754, 1761 (1995); *Arizona Elec. Power Co-op, Inc. v. United States,* 816 F.2d 1366, 1375 (9th Cir. 1987). Though the meaning of the Ak-Chin Settlement Act is clear, the statutory history further reveals Congress' intention when crafting the Ak-Chin Settlement Act. Congress appeased opponents who feared that the CAP supply would be reduced by the settlement by returning water not needed for delivery to the Ak-Chin to the CAP supply.

In the years after the Ak-Chin Settlement Act, Congress was forced to find sources of water to fulfill the claims of other tribes. Confusion over rights to Colorado River water, both CAP supply water and other water, led to a heated debate over the status of the Ak-Chin excess water. Finally, Congress used the Ak-Chin excess water to settle the claims of the San Carlos Apache Tribe. Yet, Congress recognized that removing the Ak-Chin excess water from the CAP supply would harm some CAP contractors and waived sovereign immunity over such claims. *See* SCAT Act, Pub. L. 102-575, § 3708(f).

Absent the SCAT Act, the Plaintiffs would have received the surplus water and are the first CAP users effected by its removal from the CAP supply. Plaintiffs have never argued that the Ak-Chin excess water was to be allocated to them directly. What they have argued is that the water taken from the CAP for the Ak-Chin settlement was to be returned to the general CAP pool to the extent that it was not needed for use by the Ak-Chin. The fact that the excess water is composed of the Ak-Chin's 1983 allocation does not make a difference to the general CAP pool's entitlement to the water. The settlement was arranged this way for the purpose of ensuring a supply of 50,000 A.F. to the Ak-Chin Community that had a priority over the CAP. Yet, for the Ak-Chin to receive this priority water, they gave the excess of their 1983 CAP allotment back to the general CAP pool. Once in the CAP, the water had to follow the Secretary's 1983 Allocation Decision and contract commitments. Non-Indian agricultural users, such as Plaintiffs, contracted for the residual pool of water not allocated to and contracted for by other CAP users. The SCAT Act reduced the amount of water available to the CAP and, due to the structure of CAP, the non-Indian agricultural users will be the first to suffer from this reduction.

The Defendant has repeatedly attempted to shift the focus from the clear directive contained in the Ak-Chin Settlement Act that the excess water be returned to the CAP, to

the status of the water prior to this provision; i.e, it was an Indian allocation or it was priority Yuma-Mesa Division water. Regardless of what the water was, the Ak-Chin Settlement Act placed the excess water into the general CAP pool which had already been contracted for. Therefore, had the Ak-Chin excess water not been permanently allocated to the San Carlos Apache Community, the Plaintiffs certainly would have received the surplus water in normal years.

In the Ak-Chin Settlement Act, Congress limited the Secretary's authority to the excess Ak-Chin water by providing that he may allocate it only to the CAP. Pub. L. 98-530, § 2(f), 98 Stat. at 2701. Yet, Congress later directed the Secretary to permanently allocate the excess Ak-Chin water to the San Carlos Apache Community. Pub. L. 102-575, § 3701. This permanent allocation is outside of the San Carlos Apache's CAP allocation and the CAP structure. As such, the allocation contradicts the Ak-Chin Settlement Act's requirement that the Ak-Chin excess water be allocated to the general CAP supply.

Though the Secretary has broad discretion over CAP water, that authority may be circumscribed by contractual obligations and clear congressional intent. *See Lujan*, 764 F.Supp. at 589. The Secretary's actions may be reviewed under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. The reviewing court shall hold any acts that are not in accordance with the law to be unlawful and set aside the action. *Lujan*, 764 F.Supp. at 589. Plaintiffs are not seeking to set aside the agency action. Instead, since Congress directed the Secretary to allocate the Ak-Chin excess water to the San Carlos Apache Community, Plaintiffs are seeking compensation for the loss of the water under the Fifth Amendment Takings Clause.

3. Protectable Property Interest

The Court must next determine whether the Plaintiffs have a compensable property interest in the Ak-Chin excess water protected by the Fifth Amendment. U.S. Const. Amend. V; *see Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573,

1580 (Fed. Cir. 1993) (taking compensable under Fifth Amendment inherently requires existence of private property interest). Generally, "[r]ights against the United States arising out of a contract with it are property protected by the Fifth Amendment." *Lynch v. United States,* 292 U.S. 571, 579 (1934). However, to establish a property interest, Plaintiffs must demonstrate a legitimate claim of entitlement. *See City of Santa Clara v. Pacific Gas & Electric Co.,* 572 F.2d 660, 676 (9th Cir.) (citing *Board of Regents v. Roth,* 408 U.S. 564 (1972)). Plaintiffs must have more than a unilateral expectation of a benefit. *See id.*; *see also Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 161 (1980) ("mere unilateral expectation or an abstract need is not a property interest entitled to protection"). Yet, water rights, the type of which are at issue here, have been specifically recognized as property protected by the Fifth Amendment. *See Fort Mohave Indian Tribe v. United States,* 23 Cl.CT. 417 (1991).

Defendants contend that the same issues presented in this case have already been resolved in district court in a suit brought by these same Plaintiffs. *See Central Arizona Irr. & Drainage Dist. v. Lujan,* 764 F.Supp. 582 (D. Ariz. 1991). In *Lujan* the District Court upheld amendments to the Secretary's Master Repayment Contract with CAWCD that allowed M & I users to use part of their allotments for groundwater recharge. *Id.* at 588. The Plaintiffs challenged the use of CAP water for recharging on the basis that it is contrary to state law and deprived them of water that the M & I users could not put to direct use and would otherwise become part of the residual pool. *Id.* The *Lujan* court held that CAP allocations and preferences are the exclusive provenance of the Secretary and Plaintiffs had only a unilateral expectation of receiving the water. *Id.* Plaintiffs had only an expectation to receive water that was not "used" by the M & I users and the Secretary's determination made it possible for M & I users to "use" their entire allocation. *See id.* at 589.

Defendant now argues that the district court has already held that Plaintiffs have only a unilateral expectation of receiving *any* water. This in not what the *Lujan* court held. *Lujan* specifically holds that the Secretary has the discretion to determine priorities and uses of CAP water. *Id.* at 590. Yet, Congress may limit the Secretary's discretion as it did in the Ak-Chin Settlement Act and the SCAT Act. *See id.*

Plaintiffs had a contractual right to receive the residual pool of CAP water. Plaintiffs acknowledge that the Districts' pool "existed only at the mercy of the prior demands of the Indians and M & I users." Pls' Response, p. 13. However, these demands are limited to the amount allocated to them in the Secretary's 1983 Allocation Decision and confirmed in contracts. Removing water specifically allotted to the CAP general supply to settle claims of one user is tantamount to increasing that user's allotment with water already contracted for by another user. Since all CAP water was contracted for, none of the CAP pool was available to settle water claims.

Congress certainly has the power of eminent domain that it may exercise to appropriate the Ak-Chin excess water and utilize it in the San Carlos Apache Settlement. U.S. Const. Amend V; *see AMSAT Cable Ltd. v. Cablevision of Conn. Ltd. Partnership,* 6 F.3d 867 (2nd Cir. 1993) (exercise of eminent domain power will generally be upheld when it is rationally related to conceivable public purpose). When Congress removed the Ak-Chin excess water from the general CAP pool it removed water that the Plaintiffs had contractual rights to receive. Certainly, not all economic rights are compensable property rights. *See Kaiser Aetna v. United States,* 444 U.S. 164, 176 (1979). Only those rights which are backed by law, generate a compensable Fifth Amendment taking. *See id.* In this case, Congress specifically allocated the Ak-Chin excess water to the CAP supply, for which the Plaintiffs had contractual rights to receive a portion of the residual pool.

The Fifth Amendment protects private property interests consisting of recognized expectations and mutual understandings from being taken for public use. *See Skip Kirchdorfer,* 6 F.3d at 1580-81. By removing the Ak-Chin excess water from the CAP supply in the SCAT Act, Congress violated its previous commitment of the water to the CAP supply and, therefore, its commitment to the 1983 Allocation Decision and delivery contracts. Since Plaintiffs had contractual rights to the Ak-Chin excess water as a part of the CAP supply, they are entitled to compensation. *See Lynch*, 292 U.S. at 579.

4. Damages

Defendant also argues that Plaintiffs cannot prove their damages without resorting to speculation. Yet, after receiving its settlement, the San Carlos Apache Community leased portions of their water (which includes the Ak-Chin excess water) to the cities of Chandler, Glendale, Goodyear, Mesa, Peoria, Phoenix, Scottsdale, Tempe, and the Town of Gilbert for $1,200 per A.F., not including CAP capital or operation and maintenance costs. The San Carlos Apache are not the only Indian tribe to lease their water. Likewise, the Ak-Chin lease a portion of the water received in the Ak-Chin Settlement Act to the Del Webb Corporation. P1's Exh. 31. Even the Department of Interior has purchased CAP contract water from the Harguahala Valley Irrigation District to help resolve the claims of the Fort McDowell Indian Community.

These transactions confirm that the water rights in question, like any other property right, are valuable and may be bought and sold in the marketplace. As such, the value of these water rights may be proven without resorting to speculation.

IV. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment, filed December 15, 1995 (Doc. #20), is DENIED.

IT IS FURTHER ORDERED that Plaintiffs' Partial Motion for Summary Judgment, filed December 15, 1995 (Doc. #23), is GRANTED.

IT IS FURTHER ORDERED setting a status hearing for March 10, 1997 at 2:30 p.m. to discuss the issue of damages.

DATED this 20th day of February, 1997.

Stephen M. McNamee
United States District Judge

Copies to all counsel of record

APPENDIX D

BOULDER CANYON PROJECT ACT, 43 U.S.C. §§ 617 *et seq.*

§ 617d. Contracts for storage and use of waters for irrigation and domestic purposes; generation and sale of electrical energy

The Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this subchapter, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this subchapter and the payments to the United States under subsection (b) of section 617c of this title. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to subsection (a) of section 617c of this title. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

After the repayments to the United States of all money advanced with interest, charges shall be on such basis and the revenues derived therefrom shall be kept in a separate fund to be expended within the Colorado River Basin as may hereafter be prescribed by the Congress.

APPENDIX E

COLORADO RIVER BASIN PROJECT ACT, 43 U.S.C. §§ 1501 *et seq.*

§ 1501. Congressional declaration of purpose and policy

(a) It is the object of this chapter to provide a program for the further comprehensive development of the water resources of the Colorado River Basin and for the provision of additional and adequate water supplies for use in the upper as well as in the lower Colorado River Basin. This program is declared to be for the purposes, among others, of regulating the flow of the Colorado River; controlling floods; improving navigation; providing for the storage and delivery of the waters of the Colorado River for reclamation of lands, including supplemental water supplies, and for municipal, industrial, and other beneficial purposes; improving water quality; providing for basic public outdoor recreation facilities; improving conditions for fish and wildlife, and the generation and sale of electrical power as an incident of the foregoing purposes.

(b) It is the policy of the Congress that the Secretary of the Interior (hereinafter referred to as the "Secretary") shall continue to develop, after consultation with affected States and appropriate Federal agencies, a regional water plan, consistent with the provisions of this chapter and with future authorizations, to serve as the framework under which projects in the Colorado River Basin may be coordinated and constructed with proper timing to the end that an adequate supply of water may be made available for such projects, whether heretofore, herein, or hereafter authorized.

§ 1521. Central Arizona Project

(a) Construction and operation; Granite Reef aqueduct and pumping plants; Orme Dam and Reservoir; Buttes Dam and Reservoir; Hooker Dam and Reservoir; Charleston Dam and Reservoir; Tucson aqueducts and pumping plants; Salt-Gila aqueducts; related and appurtenant works

For the purposes of furnishing irrigation water and municipal water supplies to the water-deficient areas of Arizona and western New Mexico through direct diversion or exchange of water, control of floods, conservation and development of fish and wildlife resources, enhancement of recreation opportunities, and for other purposes, the Secretary shall construct, operate, and maintain the Central Arizona Project, consisting of the following principal works: (1) a system of main conduits and canals, including a main canal and pumping plants (Granite Reef aqueduct and pumping plants), for diverting and carrying water from Lake Havasu to Orme Dam or suitable alternative, which system may have a capacity of 3,000 cubic feet per second or whatever lesser capacity is found to be feasible: *Provided*, That any capacity in the Granite Reef aqueduct in excess of 2,500 cubic feet per second shall be utilized for the conveyance of Colorado River water only when Lake Powell is full or releases of water are made from Lake Powell to prevent the reservoir from exceeding elevation 3,700 feet above mean sea level or when releases are made pursuant to the proviso in section 1552(a)(3) of this title: *Provided further*, That the costs of providing any capacity in excess of 2,500 cubic feet per second shall be repaid by those funds available to Arizona pursuant to the provision of section 1543(f) of this title, or by funds from sources other than the development fund: (2) Orme Dam and Reservoir and power-pumping plant or suitable alternative; (3) Buttes Dam and Reservoir, which shall be so operated as not to prejudice the

rights of any user in and to the waters of the Gila River as those rights are set forth in the decree entered by the United States District Court for the District of Arizona on June 29, 1935, in United States against Gila Valley Irrigation District and others (Globe Equity Numbered 59); (4) Hooker Dam and Reservoir or suitable alternative, which shall be constructed in such a manner as to give effect to the provisions of subsection (f) of section 1524 of this title; (5) Charleston Dam and Reservoir; (6) Tucson aqueducts and pumping plants; (7) Salt-Gila aqueducts; (8) related canals, regulating facilities, hydroelectric powerplants, and electrical transmission facilities required for the operation of said principal works; (9) related water distribution and drainage works; and (10) appurtenant works.

(b) Limitation on water diversions in years of insufficient mainstream Colorado River water

Article II(B)(3) of the decree of the Supreme Court of the United States in Arizona against California (376 U.S. 340) shall be so administered that in any year in which, as determined by the Secretary, there is insufficient main stream Colorado River water available for release to satisfy annual consumptive use of seven million five hundred thousand acre-feet in Arizona, California, and Nevada, diversions from the main stream for the Central Arizona Project shall be so limited as to assure the availability of water in quantities sufficient to provide for the aggregate annual consumptive use by holders of present perfected rights, by other users in the State of California served under existing contracts with the United States by diversion works heretofore constructed, and by other existing Federal reservations in that State, of four million four hundred thousand acre-feet of mainstream water, and by users of the same character in Arizona and Nevada. Water users in the State of Nevada shall not be required to bear shortages in any proportion greater than would have been imposed in the absence of this subsection. This subsection shall not affect the relative priorities, among themselves, of water users in Arizona,

Nevada, and California which are senior to diversions of the Central Arizona Project, or amend any provisions of said decree.

* * *

§ 1524. Water furnished from Central Arizona Project

* * *

(b) Contracts with municipal and industrial users

(1) Irrigation and municipal and industrial water supply under the Central Arizona Project within the State of Arizona may, in the event the Secretary determines that it is necessary to effect repayment, be pursuant to master contracts with organizations which have power to levy assessments against all taxable real property within their boundaries. The terms and conditions of contracts or other arrangements whereby each such organization makes water from the Central Arizona Project available to users within its boundaries shall be subject to he Secretary's approval, and the United States shall, if the Secretary determines such action is desirable to facilitate carrying out the provisions of this chapter, have the right to require that it be a party to such contracts or that contracts subsidiary to the master contracts be entered into between the United States and any user. The provisions of this clause (1) shall not apply to the supplying of water to an Indian tribe for use within the boundaries of an Indian reservation.

(2) Any obligation assumed pursuant to section 485h(d) of this title with respect to any project contract unit or irrigation block shall be repaid over a basic period of not more than fifty years; any water service provided pursuant to section 485h(e) of this title may be on the basis of delivery of water for a period of fifty years and for the delivery of such water at an identical price per acre-foot for water of the same class at the several points of delivery from the main canals and conduits and from such other points of delivery as the Secretary may designate; and long-term

contracts relating to irrigation water supply shall provide that water made available thereunder may be made available by the Secretary for municipal or industrial purposes if and to the extent that such water is not required by the contractor for irrigation purposes.

(3) Contracts relating to municipal and industrial water supply under the Central Arizona Project may be made without regard to the limitations of the last sentence of section 485h(c) of this title; may provide for the delivery of such water at an identical price per acre-foot for water of the same class at the several points of delivery from the main canals and conduits; and may provide for repayment over a period of fifty years if made pursuant to clause (1) of said section and for the delivery of water over a period of fifty years if made pursuant to clause (2) thereof.

* * *

APPENDIX F

Public Law 98-530
98th Congress

An Act
Relating to the water rights of
the Ak-Chin Indian Community.

* * *

SEC. 2. (a) As soon as possible but not later than January 1, 1988, the Secretary shall deliver annually a permanent water supply from the main project works of the Central Arizona Project to the southeast corner of the Ak-Chin Indian Reservation of not less than seventy-five thousand acre-feet of surface water suitable for agricultural use except as otherwise provided under subsections (b) and (c).

(b) In any year in which sufficient surface water is available, the Secretary shall deliver such additional quantity of water as is requested by the Community not to exceed ten thousand acre-feet. The Secretary shall be required to carry out the obligation referred to in this subsection only if he determines that there is sufficient capacity available in the main project works of the Central Arizona Project to deliver such additional quantity.

(c) In time of shortage, if the aggregate supply of water referred to in subsection (f) is not sufficient to deliver seventy-five thousand acre-feet, the Secretary may deliver a lesser quantity but in no event less than seventy-two thousand acre-feet. For the purposes of this Act, the term "time of shortage" means a calendar year for which the Secretary determines that a shortage exists pursuant to section 301(b) of the Colorado River Basin Project Act of September 30, 1968 (Public Law 90-537), such that there is not sufficient Central Arizona Project water in that year to supply up to a limit of three hundred nine thousand eight hundred and twenty-eight acre-feet of water for

Indian uses, and up to a limit of five hundred ten thousand acre-feet of water for non-Indian municipal and industrial uses.

* * *

(f) The water supply referred to in subsections (a) and (c) shall consist of the aggregate of the following --

(1) First, a permanent supply of no more or less than fifty thousand acre-feet of surface water per annum to be diverted from the Colorado River of the three hundred thousand acre-feet of water heretofore authorized by the Act of July 30, 1947 (61 Stat. 628), for beneficial consumptive use on lands of the Yuma Mesa Division of the Gila Project. Water referred to in this paragraph and in subsection (g)(1) shall have equal priority. Furthermore, these provisions shall not affect the relative priorities among themselves of water users in Arizona, Nevada, and California which are senior to diversions for the Central Arizona Project as fully set out in section 301(b) of Public Law 90-537.

(2) Such Central Arizona Project water allocated to the Community and referred to in the "Notice of Final Water Allocations to Indians and non-Indian Water Users and Related Decisions" (48 Fed. Reg. 12446, March 24, 1983) as is necessary to fulfill the Secretary's water delivery obligations. Delivery of such Central Arizona Project water shall be as provided in the December 11, 1980, Central Arizona Project water delivery contract between the United States and the Ak-Chin Indian Community, except as otherwise provided by this Act and any contract executed pursuant to this Act.

Notwithstanding any other provision of this Act, nothing in paragraph (1) of this subsection shall enlarge or diminish the authority of the Secretary under existing law. Nothing in section 4 or any other provision of this Act shall reduce the Secretary's obligation to deliver to the Ak-Chin Reservation a

permanent supply of fifty thousand acre-feet of surface water per annum as well as the water referred to in paragraph (2) of this subsection.

* * *

(k) The water referred to in subsection (f)(1) shall be for the exclusive use and benefit of the Ak-Chin Indian Community, except that whenever the aggregate water supply referred to in subsection (f) exceeds the quantity necessary to meet the obligations of the Secretary under this Act, the Secretary shall allocate on an interim basis to the Central Arizona Project any of the water referred to in subsection (f) which is not required for delivery to the Ak-Chin Indian Reservation under this Act.

APPENDIX G

TITLE XXXVII--SAN CARLOS APACHE TRIBE WATER RIGHTS SETTLEMENT, ARIZONA

SEC. 3704. WATER.

(a) REALLOCATION OF WATER.--The Secretary shall reallocate for the exclusive use of the Tribe, all of the water referred to in subsection (f)(2) of section 2 of the Act of October 19, 1984 (98 Stat. 2698), which is not required for delivery to the Ak-Chin Indian Reservation under that Act. The Secretary shall exclude, for the purposes of determining the allocation and repayment of costs of the CAP as provided in Article 9.3 of Contract No. 14-0906-09W-09245, Amendment No. 1, between the United States and CAWCD dated December 1, 1988, and any amendment or revision thereof, the costs associated with such water from CAWCD's repayment obligation and such costs shall be nonreimbursable.

* * *

SEC. 3708. SATISFACTION OF CLAIMS.

* * *

(f) CLAIMS.--(1) The United States District Court for the District of Arizona and the United States Claims Court are authorized to hear and decide any claim brought by the Central Arizona Water Conservation District or other contractors of CAP water. Any such claim shall be filed within two years of the date of enactment of this Act, and shall be heard by the court on an expedited basis. If such a claim is filed and the court grants judgment for the plaintiff(s), the court shall award such relief as it deems proper, and shall award costs and attorneys' fees to the plaintiff(s). Any judgment of the court shall be subject to appeal on the same basis that other judgments of that court are subject to review under existing law.

(2) For purposes of this subsection,"claim" means a claim that the reallocation of water to the Tribe pursuant to

section 3704(a) of this Act has unlawfully deprived the Central Arizona Water Conservation District or other contractors of CAP water of legal rights to such water.

APPENDIX H

DEPARTMENT OF THE INTERIOR
Office of the Secretary

Central Arizona Project, Arizona; Water Allocations and Water Service Contracting; Record of Decision

March 24, 1983

AGENCY: Office of the Secretary, Interior.

ACTION: Notice of final water allocations to Indian and non-Indian water users and related decisions.

SUMMARY: The purpose of this action is to provide notice of final decisions made by the Secretary of the Interior concerning the allocation of water developed by the Central Arizona Project (CAP) to Indian and non-Indian water users, the conditions upon which those allocations were made, and water service contracting.

FOR FURTHER INFORMATION CONTACT: David G. Houston, Deputy Assistant Secretary, Land and Water Resources, U.S. Department of the Interior, Washington, D.C. 20240. Telephone: (202) 343-5676.

SUPPLEMENTARY INFORMATION: Previous Department of the Interior notices concerning CAP water allocations were published in the Federal Register on December 20, 1972, April 18, 1975, October 18, 1976, August 8, 1980 and December 10, 1980. Previous notices concerning compliance with the National Environmental Policy Act of 1969 in connection with CAP water allocations were published on June 2, 1981, December 4, 1981, December 11, 1981, and March 24, 1982.

These decisions were made pursuant to the authority vested in the Secretary of the Interior by the Reclamation Act of 1902, as amended and supplemented (32 Stat. 388, 43 U.S.C.

391) and the Colorado River Basin Project Act of September 30, 1968 (82 Stat. 885, 43 U.S.C. 1501), the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR Part 1505) and the Implementing Procedures of the U.S. Department of the Interior (516 DM 5.4), and in recognition of the Secretary's trust responsibilities to the Indian tribes of central Arizona. They were made after full consideration by the Secretary and his staff of the decisionmaking records and activities of previous Secretaries of the Interior on the subject of CAP water allocations, the draft and final environmental impact statements prepared on Water Allocations and Water Service Contracting, Central Arizona Project (INT-DES 81-50 and INT-FES 82-7 respectively), and the views of members of the public, officials of other Federal agencies and the State of Arizona, Members of the Congress, Indian tribes and environmental organizations presented in the form of written comments and correspondence or orally at meetings and public hearings held in connection with the allocations and environmental impact statements.

Decision

The Secretary of the Interior has elected to allocate waters developed by the Central Arizona Project (CAP) and to proceed with water service contracting with Indian and non-Indian users for the delivery of Arizona's remaining entitlement to Colorado River water. This decision allocates 309,828 acre-feet annually of water for Indian use (see Table 1) and 640,000 acre-feet annually for municipal and industrial (M&I) use (see Table 2), with the remaining supply for non-Indian agricultural use (see Table 3).

These allocations will, however, be subject to the following conditions:

1. The Gila River Indian Community will be offered a water service contract for 173,100 acre-feet per year for irrigation purposes on the reservation subject to acceptance of feasible non-potable water exchanges and subject to a 25

percent reduction in water short years with the remaining 75 percent of the irrigation allocation on a priority basis with 510,000 acre-feet of non-Indian M&I allocations.

2. Indian entities with existing contracts which provide for non-potable water exchanges will be required to accept non-potable water exchanges where feasible and consistent with contractual provisions.

3. Allocations to tribal homelands are intended to serve irrigation, domestic, municipal, and industrial uses on the Reservations and repayment of allocated project costs will be based on actual uses of the water and will be in accordance with applicable statutes.

4. The M&I allocation of 640,000 acre-feet per year can be made more firm by executing feasible non-potable effluent exchanges with Indian tribes. This allocation is subject to adoption of a pooling concept whereby all M&I allottees share in the benefits of effluent exchanges.

5. Water service contracting with M&I entities will proceed in accordance with this decision and based on quantities delineated on Table 2 herein.

6. An initial contracting period extending for 6 months will be provided and, in the absence of extenuating circumstances, the expiration of such period will lead to a request on behalf of the Secretary for the Arizona Department of Water Resources (DWR) to recommend reallocation of any remaining M&I and non-Indian agricultural water not contracted for during the initial contract period.

7. All water not contracted for, or contracted for but not expected to be utilized during interim periods, will be retained under jurisdiction of the Secretary and will be marketed on an interim basis to expedite repayment of the CAP.

CAP Water Allocation Description

The decision is to allocate 309,828 acre-feet of CAP water annually to 12 Indian entities for irrigation or for maintaining tribal homelands; and to accept the State of

Arizona's 1982 allocation recommendations for non-Indian users, which provide 640,000 acre-feet annually for M&I use, with the remaining supply for non-Indian agricultural use.

The quantities allocated to Indian users and the purposes they will serve are shown in Table 1.

TABLE 1. -- CAP WATER ALLOCATIONS, INDIAN COMMUNITIES

Units: Acre-feet			
Entity	Irrigation	Tribal homeland[1]	Total
Ak Chin	58,300		58,300
Camp Verde		1,200	1,200
Fort McDowell		4,300	4,300
Gila River	173,100		173,100
Papago-Chuichu	8,000		8,000
Papago-San Xavier		27,000	27,000
Papago-Schuk Toak		10,800	10,800
Pasqua Yaqui		500	500
Salt River	13,300		13,300
San Carlos	2,700	10,000	12,700
Tonto Apache		128	128
Yavapai		500	500
Total	255,400	54,428	309,828

[1] Includes irrigation, domestic, municipal, and industrial uses on the Reservation.

To ensure that maximum beneficial use is made of CAP water supplies in conjunction with available Arizona water supplies, Indian entities with existing contracts which provide for non-potable water exchanges will be required to accept non-potable water in exchange for CAP Indian irrigation allocations where feasible and consistent with contractual provisions. During years of water supply shortages. Indian users and non-Indian M&I users would share a first priority on project water supplies. Depending upon severity of shortages, project water delivery for miscellaneous uses would be reduced pro rata until exhausted; next, non-Indian agricultural uses would be reduced the same way until exhausted; next, the Gila Tribe allocation would be reduced 25 percent and other Indian irrigation uses would be reduced 10 percent on a pro rata basis until exhausted. Thereafter, the remaining water contracted for by 11 Indian entities under existing contracts and 75 percent of the Gila River Tribe allocation would share a priority with 510,000 acre-feet of non-Indian M&I uses (the 510,000 acre-feet of M&I supply is exclusive of water obtained through effluent exchange agreements with Indian entities) and would be reduced on a proportional basis, and within each class on a prorated basis, based on the amount of water actually delivered to each entity in the latest non-shortage year.

It is further decided that the water allocated to tribal homelands, under provisions of these CAP water allocations, shall be defined to serve irrigation, domestic, municipal, and industrial uses and purposes on the Reservations and repayment shall be subject to applicable law based on the actual use of the water.

The Secretary of the Interior will retain the right to contract for water sales on an interim basis where Indian water allottees are not utilizing the full CAP allotment as provided herein.

The quantities allocated to the M&I entities recommended for CAP water by the DWR in 1982 are shown in Table 2 below. The allocations include 71 municipal users, 2 power companies, 8 mining companies, 2 recreational entities, and 2 other applicants that do not fall under any of these categories.

Table 2. -- Cap Water Allocations Municipal and Industrial[1]

[Units: Acre-feet]

Entity	Schedule of demand			
	County	1985	2005	2034
M&I (municipal):[1]				
Aqua Fria (Citizens Util. Co.)	Mar			1,439
Apache Jct. (Az. Water Co.)	Pinal			6,000
Avondale	Mar			4,099
Berneil Water Co	Mar			432
Buckeye	Mar			[2]25
Camp Verde Water Co	Other			1,443
Casa Grande (Az. Water Co.)	Mar			8,884
Carefree Ranch Water Co	Mar			954
Carefree Water Co	Mar			400

Entity	Schedule of demand			
	County	1985	2005	2034
Cave Creek Water Co	Mar			1,600
Chandler	Mar			3,668
Chandler Heights I.D.	Mar			315
Chaparral City Water Co	Mar			6,978
Clearwater Co	Mar			2,849
Coolidge (Az. Water Co.)	Pinal			2,000
Community Water Co. (Grn. Vly.)	Pima			1,100
Consolidated Water Co	Mar			3,932
Cortaro-Marana I.D	Pima			47
Cottonwood Water Co	Other			1,789
Crescent Valley Water Co	Mar			2,697
Del Lago	Pima			786
Desert Ranch Water Co	Mar			139

Entity	Schedule of demand			
	County	1985	2005	2034
Desert Sage Water Co	Mar			5,933
Desert Sands Water Co	Mar			768
Eloy	Pinal			2,171
E&R Water Co	Other			161
Florence	Pinal			1,641
Florence Gardens	Pinal			407
Flowing Wells I.D	Pima			4,354
Foothills Water Co	Pima			1,652
Gilbert	Mar			7,235
Glendale	Mar			14,083
Globe	Other			3,480
Goodyear	Mar			2,374
Green Valley Water Co	Pima			1,900
Ironwood Water Co	Mar			393
Litchfield Park Serv. Co	Mar			5,580
Maricopa Mtn. Water Co	Pinal			108

Entity	Schedule of demand			
	County	1985	2005	2034
Mayer-Humboldt Water Co	Other			332
McMicken I.D	Mar			9,513
Mesa	Mar			20,129
Miami-Claypool (Az. Water Co)	Other			1,829
Midvale Farms Water Co	Pima			1,500
New Pueblo	Pima			237
New River Utility Co	Mar			2,359
Nogales	Other			3,949
North Valley Water Co	Mar			393
Palm Springs Water Co	Pinal			2,919
Paradise Valley Water Co	Mar			3,231
Payson	Other			4,995
Peoria	Mar			15,000
Phoenix	Mar			113,882
Prescott	Other			7,127

Entity	Schedule of demand			
	County	1985	2005	2034
Queen Creek I.D	Mar			944
Ranch Lands Water Co	Pima			393
Rio Rico (Citizens Util. Co.)	Pima			2,683
Rio Verde Util. Inc	Mar			812
San Tan I.D	Mar			236
Scottsdale	Mar			19,702
Sun City (Citizens Util Co.)	Mar			15,835
Sunrise Water Co	Mar			944
Sunshine Water Co	Mar			16
Tempe	Mar			4,315
Trails End Water Service	Other			226
Tucson	Pima			151,064
Turner Ranches	Mar			3,932
West End Water Co	Mar			157
West Phoenix Water Co	Mar			91

Entity		Schedule of demand		
	County	1985	2005	2034
White Tank (Az. Water Co.)	Mar			968
William A. F. Base	Mar			833
Youngtown	Mar			380
Subtotal				494,742
M&I (Power):				
Az. Publ. Serv./Salt Rv. Proj		55,400	[3]	[4]43,218
M&I (Mines):				
Anamax, Twin Buttes	Pima	6,105	[3]	4,444
Asarco -- Hayden	Other	833	[3]	582
-- Mission	Pima	4,161	[3]	[5]0
Cities Serv. Co	Other	3,285	[3]	2,271
Cyprus-Pima	Pima	7,263	[3]	5,339
Duval	Pima	11,628	[3]	8,549
Inspiration Copper	Other	4,647	[3]	2,906
Kennecott	Other	28,611	[3]	2,028
Phelps-Dodge	Other	20,866	[3]	14,665
Subtotal Mines				60,784

Entity		Schedule of demand		
	County	1985	2005	2034
M&I (Recreation):				
Az. Game & Fish Dept	Mar	755	[3]	324
Maricopa County	Mar	852	[3]	665
Subtotal -- Rec				989
M&I (Other):				
Phx. Memorial Park	Mar			84
State Land Department				39,006
Subtotal -- Other				39,090
Total				[6]638,823

[1] Municipal subcontractors will be allowed to use up to the amount of water identified for the year 2034 at any time during the contract repayment period.

[2] The maximum allocation shall be 434 acre-feet until 2005, then reducing to 25 acre-feet per year for the year 2034.

[3] Subcontractors will be allowed to utilize the indicated amount until such time that all M&I use totals 640,000 acre-feet.

[4] Distribution between the two entities to be determined during contract negotiations.

[5] No request for water in the year 2034.

[6] Rounded to 640,000.

To ensure that maximum use is made of available CAP water supplies, the Secretary of the Interior will retain the right to contract for water sales on an interim basis where water

allottees are not utilizing the full CAP allotment as provided herein.

The allocations to M&I users can be made more firm by, and are premised on expectations that, municipal effluent in quantities of least 100,000 acre-feet per year will be exchanged with Indian users. These expectations are consistent with the Indian allocations where this decision provides that exchanges will be required where feasible and consistent with contractual provisions. Exchanges will be treated under a pooling concept whereby benefits of exchange will accrue to all M&I users.

The CAP water allocations to the non-Indian agricultural users shall include the remaining supplies and are expressed as percentages of water available to non-Indian agriculture. These agricultural entities range in size from 90 acres to over 150,000 acres and include 23 irrigation districts or farming operations. Table 3 below provides the percent of supply available for each entity.

As previously noted for Indian allottees and non-Indian municipal and industrial allottees, the Secretary of the Interior will retain the right to contract for water sales on an interim basis where water allottees are not utilizing the full CAP allotment as provided herein.

TABLE 3. -- CAP WATER ALLOCATION
NON-INDIAN IRRIGATION[1]

	Percent of supply available for non-Indian agriculture		
	1985	2005[2]	2034[2]
Arcadia Water Company	0.13		
Arva Valley Assocation	3.69		

	Percent of supply available for non-Indian agriculture		
	1985	2005[2]	2034[2]
Central Arizona Irrigation District	18.01		
Chandler Heights Irrigation District	.28		
Cortaro-Marana Irrigation District	2.14		
FICO	1.39		
Harquahala Valley Irrigation District	7.67		
Hohokam Irrigation District	6.36		
La Croix	.04		
Maricopa-Stanfield Irrigation District	20.48		
Marley, Jemper Jr.	.04		
McMicken Irrigation District	7.28		
MCMWCD #1	4.66		
New Magma Irrigation District	4.34		
Queen Creek Irrigation District	4.83		
Rood, W. E.	.04		
Roosevelt Irrigation District	2.61		

	Percent of supply available for non-Indian agriculture		
	1985	2005[2]	2034[2]
RWCD	5.98		
Salt River Project	2.97		
San Carlos Irrigation District[3]	4.09		
San Tan Irrigation District	.77		
Tonopah Irrigation District	1.98		
U.S. Forest Service	.22		
Total	100.00		

[1] During shortages, all M&I and Indian uses would have priority over non-Indian irrigation. When available, non-Indian irrigation shares the project supply available for this purpose according to the listed percentages. These allocations are based in part on recommendations from the State of Arizona and percentages shown are reflective of those provided in correspondence to the Secretary of the Interior dated January 18, 1982, and November 10, 1982, from the Arizona Department of Water Resources.

[2] The allocation for years subsequent to 1985 will be based on the 1985 allocation minus the supply that would have been delivered to eligible lands that have been converted to M&I or otherwise removed from irrigation. Contract language similar to that contained in the letter to the Secretary of the Interior from the Arizona Department of Water Resources dated November 10, 1982, will be included in all non-Indian irrigation subcontracts.

[3] The water service subcontract among the United States, the Central Arizona Water Conservation District (CAWCD) and the San Carlos Irrigation District (District) will not require the District to reduce the amount of groundwater pumped by the amount of CAP water received. However, the subcontract will require that the District continue to employ measures adequate in the judgment of the Secretary and the CAWCD to control expansion of irrigation in the contract service area and to reduce pumping of groundwater consistent with, and to comply in all other respects with, Arizona's statutory requirements.

During years of water supply shortages, Indian users and non-Indian M&I users would share a first priority on project water supplies. Depending upon severity of shortages, miscellaneous uses would be reduced pro rata until exhausted; next, non-Indian agricultural uses would be reduced the same way until exhausted; next, 25 percent of the Gila Tribe allocation and 10 percent of the irrigation amount allocated to Indian contractors other than the Gila Tribe would be reduced pro rata until exhausted. Finally, the remaining water contracted for by 11 Indian entities under existing contracts and 75 percent of the Gila River Tribe allocation would share a priority with 510,000 acre-feet of non-Indian M&I uses (510,000 acre-feet for M&I is exclusive of water obtained through effluent exchange agreements with Indian entities) and would be reduced on a proportional basis, and within each class on a prorated basis, based on the amount of water actually delivered to each entity in the latest non-shortage year.

Description of Alternative Allocations

The following alternatives were considered by the Department in reaching its decision:

A. *Options*--Water Allocation

A.1. *No Action.* The "No Action" alternative would allocate CAP water based upon the demands anticipated during the planning stages of the project: M&I deliveries at 82,000 acre-feet, 232,000 acre-feet, and 312,000 acre-feet, in years

1975, 1990, and 2000 and after, respectively, in the metropolitan Phoenix and Tucson areas. The remainder would go to agricultural users (both Indian and non-Indian) shared pro rata on acreage developed for irrigation.

A.2. *Kleppe Allocation With 1981 State Recommendations.* Five central Arizona Indian tribes would be allocated 257,000 acre-feet annually for irrigation use until 2005, thereafter 10 percent of total project supplies or 20 percent of project agricultural supplies, whichever was to their advantage. M&I users would be allocated from 190,242 acre-feet (1985) to 719,992 acre-feet (2034) annually. The remainder of the CAP supplies would be shared by 23 irrigation districts or farming operations pro rata based on eligible acres.

A.3. *Andrus Allocation With 1981 State Recommendations.* This provides 12 Indian tribes or communities with a total of 309,828 acre-feet annually for irrigation or for maintaining tribal homelands. The 1981 State recommendations provide from 190,242 (1985) to 514,000 (2034) acre-feet annually to 81 M&I entities, with the remaining supply to 23 irrigation districts or farming operations. During shortages, CAP deliveries are reduced until exhausted first to all miscellaneous uses and then to non-Indian irrigation uses, then 10 percent of the Indian irrigation amount is reduced until exhausted. Finally, the remaining Indian irrigation and tribal homeland amounts are reduced pro rata with no more than 510,000 acre-feet per year of M&I uses, based on amount of water actually delivered to each entity in the most recent past year of full deliveries to these entities.

A.4. *Andrus Allocation Modified To Favor M&I Use.* The Indian allocations are the same as Alternative 3, the differences being in the distribution in times of shortage. The alternative allocates from 190,242 acre-feet (1985) to 697,020 acre-feet (2034) annually to 81 M&I entities, with the remaining supply to 23 irrigation districts or farming operations. During shortages, CAP deliveries are reduced until exhausted first to all

miscellaneous uses and then to non-Indian irrigation uses, then 25 percent of the Indian irrigation amount is reduced until exhausted. Finally the remaining Indian irrigation and tribal homeland amounts are reduced pro rata with all M&I uses, based on the scheduled amounts of water (demand) for each entity in the current year. In addition, effluent exchanges (full time) of not less than 100,000 acre-feet per year are assumed for the Salt River and Gila River reservations in amounts not to exceed 20 percent of the individual tribe's allocation prior to 2005, nor more than 50 percent after 2005.

A.5. *Andrus Allocation Modified To Favor Indian Use.* The Indian allocations are the same as Alternative 3, the differences being in the distribution in times of shortages. This alternative allocated from 190,242 acre-feet (1985) to 578,010 acre-feet (2034) annually to 81 M&I entities with the remaining supply to 23 irrigation districts or farming operations. During shortages, CAP deliveries are reduced until exhausted first to all miscellaneous uses and then to non-Indian irrigation and non-municipal M&I use. Finally, the Indian allocated amounts are reduced pro rata with the M&I (municipal only) amounts based on the quantity of water actually delivered to each entity in the most recent past year of full deliveries. There is no prior 10 percent reduction in Indian agricultural use.

A.6. *Agency Proposed Action With 1982 State Recommendations.* The Agency Proposed Action is to allocate 309,828 acre-feet annually to 12 Indian tribes for irrigation or for maintaining tribal homelands. The 1982 State Recommendations provide 640,000 acre-feet annually (2034) to 85 M&I entities, with the remaining supply to 23 irrigation districts or farming operations. During shortages, CAP deliveries would be reduced until exhausted first to all miscellaneous uses and then to non-Indian agricultural use, next, 25 percent of the Gila Tribe allocation and 10 percent of the irrigation amount allocated to Indian contractors other than the Gila Tribe would be reduced pro rata until exhausted. Finally, the remaining water contracted

for by 11 Indian entities under existing contracts and 75 percent of the Gila River Tribe allocation would share a priority with 510,000 acre-feet of non-Indian M&I uses (510,000 acre-feet for M&I is exclusive of water obtained through effluent exchange agreements with Indian entities) and would be reduced on a proportional basis, and within each class on a prorated basis, based on the amount of water actually delivered to each entity in the latest non-shortage year. In addition, effluent exchanges would be required for tribal entities where feasible and consistent with contractual provisions.

B. *Options*--Effluent Exchange

B.1. Effluent exchanges optional for tribal contractors, but not required.

B.2. Effluent exchanges with Indian tribes required where feasible and consistent with contractual provisions (i.e., where conditions specified in individual Indian contracts are met).

B.3. Allocations made consistent with option B.2., with the proviso that CAWCD will implement the "pooling concept."

B.4. Allocations made consistent with Option B.3., with added contractual provision that M&I allocations will be adjusted if effluent exchanges are not implemented.

B.5. Allocations made consistent with Option B.2., but cities would be allowed to individually exchange effluent with Indian users.

C. *Options*--Tribal Homeland

C.1. Do not define purpose of water allocated to tribal homeland at this time.

C.2. Define purpose of water allocated to tribal homeland as domestic, municipal, and industrial.

C.3. Define purpose of water allocated to tribal homeland as agricultural irrigation and therefore capital costs would be deferred under the Leavitt Act.

C.4. Define purposes of water allocated to tribal homeland as any use necessary to ensure intended purpose of the reservation including irrigation, domestic, municipal, and industrial.

Contracts would be interpreted pursuant to the *Rules, Regulations, and Determinations* provisions of the contracts to provide for appropriate repayment consistent with the actual use of the water.

C.5. Define and interpret purposes of water allocated to tribal homelands consistent with option C.4 with added clarification that agricultural irrigation uses would be subject to priority reduction of 10 percent in water short years before sharing a priority basis with non-Indian M&I.

Background for Decision

Authorized as part of the Colorado River Basin Project Act (Pub. L. 90-537) in 1968, the CAP is a multi-purpose water project which will deliver water for irrigation, municipal and industrial uses in central and southern Arizona, and by exchange, to users in western New Mexico and on Gila River tributaries upstream for CAP facilities in Arizona.

The water users can be divided into four categories: Indian agricultural irrigation, tribal homeland, non-Indian agriculture, and non-Indian M&I.

The Secretary of the Interior has the responsibility for allocating CAP waters. A final allocation of CAP water and a contract with the Secretary for delivery of the water is required so that facilities can be designed and constructed to treat (where necessary) and deliver the CAP water to the point of use. In many cases, the delivery facilities will be extensive, or will require negotiation for joint use of existing facilities, and adequate lead time is required if the users will be able to take water when the CAP comes on-line.

The main CAP aqueduct system is currently scheduled to make water deliveries to the Phoenix and Pinal county areas in 1985, and to the Tucson area in 1989 or 1990. Even if the allocations are made without delay, it is likely that some of the eventual recipients of CAP water will be unable to take delivery when the water is first made available.

On November 12, 1981, Secretary Watt provided guidance to the Bureau of Reclamation with regard to his proposed action on CAP allocations to the Indian sector. Based on the Secretary's proposal, the DWR prepared final recommendations for the allocation of CAP water to the non-Indian sector. The recommendations were forwarded to the Secretary in letters dated January 18, 1982, April 6, 1982, and November 10, 1982. These proposed Indian allocations, along with the State's recommendations for non-Indian allocations, comprised the Agency Proposed Action in the final EIS on Water Allocations and Water Service Contracting, Central Arizona Project, which was prepared by the Bureau of Reclamation and filed with the Environmental Protection Agency on March 19, 1982.

Non-Indian agricultural water users are expected to contract for and receive water available from the CAP facilities which is not being utilized in the early years by the M&I and Indian contractors. The amount of this water will be relatively substantial in the early years of the project and during years of high runoff in the Colorado River Basin. Amounts are expected to decrease during the project life as the M&I use increases.

The Department's allocation (Alternative 6) contains elements of Alternatives 3 (Andrus) and 4 (Andrus Modified for M&I). The magnitude of the alternative allocations is identical, but the distribution of the project water during times of shortage combines elements of both. Under the Andrus allocation (Alternative 3) during shortages, 10 percent of Indian allocations for irrigation use would be reduced until exhausted prior to a pro rata reduction of the remaining Indian irrigation and tribal homelands amounts on a shared priority basis with 510,000 acre-feet per year of non-Indian M&I uses. The Andrus Modified for M&I Alternative (Alternative 4), provides that during shortages, 25 percent of the Indian irrigation amount would be reduced until exhausted prior to a pro rata reduction of the remaining Indian irrigation and tribal homeland amounts with all non-Indian M&I uses. The Department's Indian

allocation is a combination of these two shortage distribution formulas. Like the Andrus allocation, the shortage distribution maintains the 510,000 acre-feet per year formula value for non-Indian M&I use, as well as the 10 percent reduction in Indian irrigation use for the 11 tribes or communities affected by water service contracts executed in December 1980 (all except the Gila River Indian Reservation). However, like Aternative 4 (Andrus Modified for M&I Use), the Gila River Indian Reservation's allocation would be reduced by 25 percent prior to the pro rata reduction.

Like Alternative 4, the Department's allocation will require effluent exchanges where feasible and consistent with contract provisions. However, in addition to the exchanges with the Salt River and Gila River Reservations described for Alternative 4, the analysis also assumes exchanges between the city of Tucson and the San Xavier Indian Reservation.

Discussion of the Environmental Consequences of the Alternatives

The requirements of the National Environmental Policy Act have been integrated into all phases of planning and development of the Central Arizona Project. A programmatic Environmental Impact Statement (EIS) was completed in 1972 and several site-specific statements have been or are in the process of being done on individual features of the project. The Bureau of Reclamation prepared a final EIS on Water Allocations and Water Service Contracting, Central Arizona Project in March 1982. Copies of the final EIS are available to the public upon request.

The Bureau addressed two general categories of impacts: The first category was impacts due to demographic and land use changes resulting from the availability or unavailability of CAP water; or due to the varying amount of CAP water made available. The second category was due to distribution system construction and development of lands for irrigation. Such actions impact wildlife and wildlife habitat, cultural resources,

social/economic conditions, groundwater quantity, population, and land use.

The agency-proposed action was derived from an institutional process that involved soliciting expressions of interest to contract for CAP water from the Arizona Indian tribes; and from requesting the State of Arizona to make recommedations on allocating CAP water for M&I use and non-Indian agriculture.

On November 12, 1981, the Secretary selected a proposed Indian allocation (Proposed Action) in order to facilitate the timely completion of the EIS. In light of the Secretary's proposed action to allocate CAP water to Indians, the State of Arizona was asked to make recommendations on allocating CAP water to non-Indians. By letters to the Secretary dated January 18, 1982, April 6, 1982, and November 10, 1982, the DWR made such recommendations after extensive public involvement procedures.

The relative differences in environmental impacts among the allocation alternatives generally are not significant. The Proposed Action provides a significant benefit to the tribes by assuring a relatively stable and predictable water supply for domestic and economic development. However, by making a reasonable reduction in the Gila Indian Reservation's allocation during times of water supply shortage, additional water is made available for non-Indian municipal and industrial use. Compared to alternatives 3 and 5 over the 50-year repayment period of the CAP, the Proposed Action is projected to deliver about 2,500,000 acre-feet more to the M&I sector, and over 1,000,000 acre-feet more to the non-Indian agricultural sector, while maintaining the essential benefits of CAP water deliveries to the tribes. The increased delivery to the M&I sector avoids locally severe impacts of water supply shortfalls in Apache Junction under alternatives 3 and 5, and to the Kennecott and Phelps Dodge mining operations under alternatives 1 and 5. Under the Proposed Action significantly less farmland would be

retired for acquisition of ground-water rights by municipalities than under alternatives 1 and 2. Hence, the Proposed Action, which falls within the range of alternatives 3 and 4 and the resulting environmental impacts is considered to be the environmentally preferred alternative.

There will also be some differing levels of environmental impacts, associated with constructing canals and laterals to deliver CAP water to Indian and non-Indian users. Future environmental analysis of individual delivery systems will include, where appropriate, the evaluation of all reasonable alternatives. All practical means to avoid or minimize adverse environmental impacts will be achieved through specific mitigation measures and monitoring provisions imposed upon the water user in the subcontract and construction specifications.

1. *Impacts from Demographic and Land Use Changes.* The Bureau's analysis indicates that there would be no significant difference in the acreage of undeveloped desert that would be converted to urban use over the 50-year project period under any of the alternative CAP water allocations (about 165,000 acres under each of the alternatives). A loss of that wildlife now associated with that desert habitat would also be expected. The amount of habitat is part of almost 20 million acres of Sonoran Desert scrub vegetation estimated to exist in Arizona.

The amount of farmland to be converted to urban use within the project service area over the 50-year project period would be about 34,500 acres for each of the alternatives. This would mean a loss of crops grown on converted farmland, predominantly cotton. The significance of impact is revealed by comparing about 34,500 acres of irrigated farmland to be lost as a result of urbanization of the estimated 792,500 harvested acres now being irrigated in the project area. The amount of irrigated farmland to be lost amounts to about 5 percent of the total farmland now being irrigated.

Some agricultural lands may be retired to make water available (grandfathered water rights) to nearby municipalities

if required to sustain projected population growth. Since the alternative CAP allocations would provide water in varying quantities for municipal use, in some cases, the combination of CAP and other dependable water supplies would not meet the demands of the projected population of a given municipality. In those cases, retirement of farmland was assumed as the most likely means for increasing the water supplies. It is estimated that a maximum of 6,900 acres would be retired from cultivation under any of the CAP allocation alternatives to meet the water demands of the municipal sector. It will take a period of time before any kind of natural vegetation is reestablished on this land. In addition, it will mean the loss of farm revenues for those now cultivating the land.

Another impact of retiring farmland is the added particulate matter in the area of abandoned fields. Retiring farmland would exacerbate the already existing problem of dust storms and fugitive dust until vegetation has recovered sufficiently to alleviate the problem.

Anticipated changes in land use on the 10 Indian reservations are not expected to be significant. While in excess of 90,000 acres have been developed for irrigation on the ten reservations, it is estimated that 50,100 acres of land are under irrigation at the present time. An additional 28,149 acres of land could be developed for irrigation under the CAP action alternatives.

Much of the irrigation use of CAP water on Indian reservations would take place on lands previously developed for irrigation. However, some of these lands were subsequently abandoned and have reverted to native vegetation, and the redevelopment of this acreage would cause wildlife habitat losses. It is also possible that the redevelopment of these lands could have adverse impacts on cultural resources that may remain partially intact.

In all cases there will be a beneficial economic impact to tribes with any of the CAP action alternatives. Alternatives 3, 4, 5, and 6 provide an added significant benefit to the tribes by

assuring a relatively stable and predictable water supply for domestic and economic development on Indian reservations. Additional jobs would be generated, per capita income would be increased, and the life style of the reservation residents would be upgraded.

Since CAP water would be used primarily as a substitute for groundwater, no changes in land use or other impacts are expected as a direct result of the non-Indian agricultural allocations. However, differences in allocations to M&I users could lead to farmland retirement within agricultural districts. There will also be some impacts on fish and wildlife, as well as land use, as irrigation delivery facilities such as canals and laterals are constructed to deliver CAP water to these entities.

2. *Impacts of Constructing Distribution Systems.* There will be some environmental impacts associated with constructing canals and laterals to deliver CAP water to Indian and non-Indian users. At least 40 to 50 miles of canals will be required to deliver the Indian allocation of CAP water. Most of this land will be Sonoran Desert, but some will be retired agricultural land, existing irrigated agricultural land, or undeveloped urban lands. In addition, perhaps as much as 500 miles of canals and pipelines will be required to deliver irrigation and M&I water to non-Indian entities. Under a "worst case" scenario, assuming a 66-foot construction right-of-way, 4,400 acres would be disturbed, including both developed and undeveloped land.

No adverse impacts on special status species are anticipated as a result of CAP water allocations. Changes in land use, such as development of undisturbed wildlife habitat, were projected for each of the action alternatives. The difference among the alternatives is minimal, certainly not significant in the context of endangered species habitat.

The abundance of cultural resources in the CAP area is disappearing at an increasing rate as population grows and development continues. Exact inventories of the cultural

resources and an analysis of impacts can be made only when the precise areal extent of projected land use modifications are defined. At that time, intensive archaeological/historical surveys of the above defined areas would be conducted. Generally, however, of the possible scenarios, only the conversion of lands to agriculture could have significant impact.

In some cases, where planning for delivery facilities is incomplete and it appears that such facilities would be extensive, or would be constructed in environmentally sensitive areas, further environmental analysis may be required prior to execution of a water service subcontract.

Summary

Since CAP water would be used primarily as a substitute for ground water, no major changes in population, land use, or other social indicators are expected as a result of the water allocations. Without the delivery of M&I water, the CAP service area population is projected to be just under 2.5 million by 2034. The area is projected to increase by an additional 100,000 persons by 2034 as a result of M&I water availability, representing an increase of approximately 4 percent over projected growth without CAP. The land use effects identified are of relatively minor magnitude and will not likely impose major economic effects on neighboring communities or lands.

In conclusion, the effect of CAP water would be twofold. First, the water would enable certain existing activities to be maintained at near-current levels. For example, agriculture would be able to sustain production while reducing the serious overdrafting of the ground water supplies. Second, CAP water would help to accommodate the population and economic growth that is projected for central Arizona.

Effect on Previous Decision

The decisions contained herein supersede those made by Secretary Andrus on December 5, 1980, and to the extent those decisions are inconsistent with these decisions, they are rescinded.

Dated: February 10, 1983.

James G. Watt,

Secretary of the Interior.

APPENDIX I

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

SUBCONTRACT AMONG THE UNITED STATES, THE CENTRAL ARIZONA WATER CONSERVATION DISTRICT, AND THE MARICOPA-STANFIELD IRRIGATION & DRAINAGE DISTRICT PROVIDING FOR WATER SERVICE

CENTRAL ARIZONA PROJECT

* * *

3. DEFINITIONS:

Definitions included in the Repayment Contract are applicable to this subcontract; *Provided, however*, That the terms "Agricultural water" or "Irrigation water" shall mean water used for the purposes defined in the Repayment Contract on tracts of land operated in units of more than 5 acres. The first letters of terms so defined are capitalized herein. As heretofore indicated, a copy of the Repayment Contract is attached as Exhibit "A."

4. DELIVERY OF WATER:

4.1 *Obligations of the United States.* Subject to the terms, conditions, and provisions set forth herein and in the Repayment Contract, during such periods as it operates and maintains the Project Works, the United States shall deliver Project Water for Agricultural use by the Subcontractor. The United States shall use all reasonable diligence to make available to the Subcontractor the quantity of Project Water specified in the schedule submitted by the Subcontractor in accordance with Article 4.4. After transfer of OM&R to the Operating Agency, the United States shall make deliveries of Project Water to the Operating Agency which shall make subsequent delivery to the Subcontractor as provided herein.

* * *

4.4 *Procedure for Ordering Water.*

(a) At least 15 months prior to the date the Secretary expects to issue the Notice of Completion of the Water Supply System, or as soon thereafter as is practicable, the Contracting Officer shall announce by written notice to the Contractor the amount of Project Water available for delivery during the Year in which said Notice of Completion is issued (initial Year of water delivery) and during the following Year. Within 30 days of receiving such notice, the Contractor shall issue a notice of availability of Project Water to the Subcontractor. The Subcontractor shall, within a reasonable period of time as determined by the Contractor, submit a written schedule to the Contractor and the Contracting Officer showing the quantity of water desired by the Subcontractor during each month of said initial Year and the following Year. The Contractor shall notify the Subcontractor by written notice of the Contractor's action on the requested schedule within 2 months of the date of receipt of such request.

(b) The amounts, times, and rates of delivery of Project Water to the Subcontractor during each Year subsequent to the Year following said initial Year of water delivery shall be in accordance with a water delivery schedule for that Year. Such schedule shall be determined in the following manner:

(i) On or before June 1 of each Year beginning with the Year following the initial Year of water delivery pursuant to this subcontract, the Contracting Officer shall announce the amount of Project Water available for delivery during the following Year in a written notice to the Contractor. In arriving at this determination, the Contracting Officer, subject to the provisions of the Repayment Contract, shall use his best efforts to maximize the availability and delivery of Arizona's full entitlement of Colorado River water over the term of this subcontract. Within 30 days of receiving

said notice, the Contractor shall issue a notice of availability of Project Water to the Subcontractor.

(ii) On or before October 1 of each Year beginning with the Year following said initial Year of water delivery, the Subcontractor shall submit in writing to the Contractor and the Contracting Officer a water delivery schedule indicating the amounts of Project Water desired by the Subcontractor during each month of the following Year along with a preliminary estimate of Project Water desired for the succeeding 2 years.

(iii) Upon receipt of the schedule, the Contractor and the Contracting Officer shall review it and, after consultation with the Subcontractor, shall make only such modifications to the schedule as are necessary to ensure that the amounts, times, and rates of delivery to the Subcontractor are consistent with the delivery capability of the Project, considering, among other things, the availability of water and the delivery schedules of all subcontractors.

(iv) On or before November 15 of each Year beginning with the Year following said initial Year of water delivery, the Contractor shall determine and furnish to the Subcontractor and the Contracting Officer the water delivery schedule for the following Year which shall show the amount of water to be delivered to the Subcontractor during each month of that Year, contingent upon the Subcontractor remaining eligible to receive water under all terms contained herein.

* * *

4.13 *Entitlement to Project Agricultural Water.*

(a) Commencing with the Year in which the Secretary issues the Notice of Completion of the Water Supply System and for each Year thereafter until the term of this subcontract expires, the Subcontractor's entitlement to Agricultural Water each Year shall be equal to 20.48 percent of the total supply of Agricultural Water available for delivery from the Project in the same Year; minus the amount of Project

Agricultural Water that would have been delivered to eligible lands in the Subcontractor's service area that have been converted to M&I use or have otherwise been removed from irrigation as determined by the Contracting Officer and calculated on the basis of a uniform delivery amount per acre to all eligible lands in the Subcontractor's service area at the time of execution of this subcontract; plus 20.48 percent of the sum of deductions made in all subcontractors' entitlements to reflect removal of eligible lands from agricultural use; *Provided, however,* That after consultation with the Subcontractor, the Contracting Officer may. from time to time, adjust said percent of the sum of deductions as he determines necessary to more accurately reflect the Subcontractor's equitable share of such water.

* * *

5. PAYMENTS:

5.1 *Water Service Charges for Payment of Operation, Maintenance, and Replacement Costs.* Subject to the provisions of Article 5.4 hereof, the Subcontractor shall pay in advance for Project OM&R costs estimated to be incurred by the United States or the Operating Agency. At least 15 months prior to first delivery of Project Water, or as soon thereafter as it practicable, the Contractor shall furnish the Subcontractor with an estimate of the Subcontractor's share of OM&R costs to the end of the initial Year of water delivery and an estimate of such costs for the following Year. Within a reasonable time of the receipt of said estimates, as determined by the Contractor, but prior to the delivery of water, the Subcontractor shall advance to the Contractor its share of such estimated costs to the end of the initial month of water delivery and without further notice or demand shall on or before the first day of each succeeding month of the initial Year of water delivery and the following Year advance to the Contractor in equal monthly installments the Subcontractor's share of such estimated costs. Advances of monthly payments for each subsequent Year shall be made by

the Subcontractor to the Contractor on the basis of annual estimates to be furnished by the Contractor on or before June 1 preceding each said subsequent Year and the advances of payments for said estimated costs shall be due and payable in equal monthly payments on or before the first day of each month of the subsequent Year. Differences between actual OM&R costs and estimated OM&R costs shall be determined by the Contractor and shall be adjusted in the next succeeding annual estimates; *Provided, however*, That if in the opinion of the Contractor the amount of any annual OM&R estimate is likely to be insufficient to cover the above-mentioned costs during such period, the Contractor may increase the annual estimate of the Subcontractor's OM&R costs by written notice thereof to the Subcontractor, and the Subcontractor shall forthwith increase its remaining monthly payments in such Year to the Contractor by the amount necessary to cover the insufficiency. All estimates of OM&R costs shall be accompanied by data and computations relied on by the Contractor in determining the amounts of the estimated OM&R costs and shall be subject to joint review by the Subcontractor and the Contractor.

5.2 *Agricultural Water Service Charges.*

(a) Subject to the provisions of Article 5.4 hereof and in addition to the OM&R payments required in Article 5.1 hereof, the Subcontractor shall, in advance of the delivery of Project Agricultural Water by the United States for the Operating Agency, make payments to the Contractor in equal semiannual installments of an Agricultural Water service capital charge of $2.00 for each acre-foot of Agricultural Water scheduled for delivery to the Subcontractor pursuant to the provisions of Articles 4.4 and 4.13 hereof. The Agricultural Water service capital charge payment of the quantity of water available for the Subcontractor for the balance of the initial Year of water delivery shall be advanced to the Contractor prior to commencement of delivery of water. Thereafter, for each

subsequent Year, payments by the Subcontractor shall be made in equal semiannual installments on or before the December 1 preceding said subsequent Year and the June 1 of said subsequent Year as may be specified by the Contractor in written notices to the Subcontractor.

* * *

(c) On or before the first anniversary of execution of this subcontract and on or before each succeeding anniversary, until Notice of Completion of the Water Supply System is issued, the Subcontractor shall pay, in addition to all other payments required herein, an agricultural subcontract charge which shall be equal to the amount obtained by multiplying the percentage in Subarticle 4.13(a) by $500,000. Prior to the date of issuance of the Notice of Completion of the Water Supply System, the subcontract charge shall be paid each Year by the Subcontractor to the United States. The Contracting Officer shall advise the Contractor of the amounts and dates of the Subcontractor's payments.

(d) Funds advanced to the United States by the Subcontractor pursuant to Subarticle 5.2(c) as a subcontracting charge shall be credited by the Contractor against the Subcontractor's initial capital charges for water deliveries under this subcontract. Credit provided to the Subcontractor shall include interest from the date Subcontractor's funds are transferred to the United States through the effective date of credit for payment of capital costs as recorded in the Contractor's records. Interest credited to the Subcontractor shall be at an annual rate of 1 (one) percent less than the weighted rate received by the Contractor on all investments during the period for which the Subcontractor's payments earn an interest credit.

* * *

APPENDIX J

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

CONTRACT BETWEEN THE UNITED STATES AND THE CENTRAL ARIZONA WATER CONSERVATION DISTRICT FOR DELIVERY OF WATER AND REPAYMENT OF COSTS OF THE CENTRAL ARIZONA PROJECT

* * *

5.12 "Agricultural water" or "irrigation water" shall mean project water used primarily in the commercial production of agricultural crops or livestock, including domestic use incidental thereto, on tracts of land operated in units of more than 5 acres.

* * *

5.27 "Project water" shall mean (a) all water allocated by the Secretary for project purposes by *Federal Register* notice dated March 24, 1983, and any subsequent reallocation by the Secretary as contemplated in paragraph 6 of said *Federal Register* notice, which water is available pursuant to contracts with the Secretary from: (1) the Colorado River; (2) Central Arizona Project dams and reservoirs; and (3) return flows captured by the Secretary for project use; (b) any water delivered to entities in Arizona, through the project works, as a replacement supply for Cliff Damn; (c) water delivered to water users in Arizona, through the project works, in exchange for water delivered to users in New Mexico from or by means of the project works; and (d) any additional water not included in (a) above, that is required to be delivered by the Secretary through the project, pursuant to the Ak-Chin Water Rights Settlement Act of 1978 (Public Law 95-328), as amended on October 19, 1984 (Public Law 98-530); the Southern Arizona Water Rights

Settlement Act of October 12, 1982 (Title III of Public Law 97-293); and, subject to the execution of a settlement agreement by the Contractor providing for the settlement of the water rights claims of the Salt River Pima-Maricopa Indian Community and to the Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988 (Public Law 100-512), up to 22,000 acre-feet annually of Colorado River water to be delivered through the project works in accordance with said settlement agreement and legislation.

* * *

8. *DELIVERY OF WATER*

8.12 *No Guarantee of Availability of Water.* The United States assumes no responsibility with respect to the quantity of water available for delivery pursuant to this contract. In no event shall the United States, its officers, agents, or employees, be liable for any damages, direct or indirect, of whatsoever nature, arising out of or in any way connected with any suspension or reduction in the delivery of water pursuant to this contract or with any shortage in the quantity of water available for delivery hereunder or to any subcontractor for any cause whatsoever including, but not limited to, drought, delay in the construction of the Navajo Project, the failure of the Navajo Project to be completed, or the lack of power for pumping.